Supreme Court, U.S.
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In The

Supreme Court of the United States

SOLDIERS OF JESUS CHRIST, INC.,

Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and KENNETH H. KUBE,

Respondents.

On Petition For A Writ Of Certiorari To The Wisconsin Court Of Appeals, District III

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution requires the Wisconsin Labor and Industry Review Commission ("LIRC") to apply a broader definition of the statutory terms "church," and "primarily for religious purposes," as appearing in Wis. Stat. § 108.02(15)(h)(1)-(2), in order to avoid unconstitutionally intrusive judicial inquiry.

2. Whether the First Amendment to the United States Constitution requires that the *de novo* review standard apply to the Wisconsin Labor and Industry Review Commission's decision that Peniel is not a "church" or "operated primarily for religious purposes" under Wis. Stat. § 108.02(15)(h)(1)-(2).

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OPINIONS BELOW

The order of the Wisconsin Supreme Court denying review of the Court of Appeals decision (App., *infra*, 1-2) and the decision of the Court of Appeals, District III, Appeal No. 99-0846 (App., *infra*, 3-13) are unreported. The decision of the Circuit Court, Branch II, St. Croix County, Case No. 98-CV-187 (App., *infra*, 14-22), the decision of the Wisconsin Labor and Industry Review Commission ("LIRC") (App., *infra*, 23-37), and the decision of the Administrative Law Judge (App., *infra*, 38-43) are also unreported.

JURISDICTION

The Wisconsin Supreme Court entered its order on April 26, 2000 (App., *infra*, 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Wis. Stat. § 108.02(15)(h)(1)-(2) provides, in relevant part, exemptions from the definition of "employment," as applied to work for a nonprofit organization, service in the employ of a "church" or an organization "operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches."

STATEMENT

A. Proceedings at Peniel

Soldiers operates a church and school called Peniel led by Ken Sortedahl, a Lutheran Pastor (App., *infra*, 4; 102). Worship services are held twice daily (App., *infra*, 4; 16; 57; 107). Communion services are held every Monday (App., *infra*, 57; 107). Baptism services are also held at Peniel (App., *infra*, 5; 16; 57). Pastor Sortedahl and other worship leaders "just preach the Bible" at Peniel (App., *infra*, 12; 16; 57; 107). Though Pastor Sortedahl is a

Lutheran Pastor, Peniel is non-denominational (App., *infra*, 9; 16; 107).

B. Proceedings Below

Kenneth H. Kube ("Kube") filed for unemployment compensation after his employment with Soldiers ended in August of 1994 (App., *infra*, 5). The Department of Industry, Labor and Human Relations, Unemployment Compensation Division, issued an initial determination that Soldiers was exempt pursuant to Wis. Stat. § 108.02(15)(h)(2) (App., *infra*, 5; 17).

Kube's claim was initially handled by Sherry Bernhardt (App., *infra*, 48; 105). At the time of the later hearing before the ALJ in this case, Ms. Bernhardt had been employed by the Wisconsin Department of Workforce Development for 25 years, the last 12 of which she had served has an Unemployment Tax and Accounting Specialist in the Division of Unemployment Insurance (App., *infra*, 105). She testified before the ALJ that she made the initial determination "because we were advised it was a church. In these investigations concerning churches we accept their word" (App., *infra*, 138-139).

Kube appealed and the hearing before the ALJ was held on June 5, 1997 (App., *infra*, 38-43). The ALJ reversed the initial determination on June 27, 1997 (App., *infra*, 38-43). Soldiers appealed to the LIRC, which issued a decision on April 7, 1998 affirming the ALJ's decision (App., *infra*, 23-37). Soldiers appealed to the Circuit Court of St. Croix County, which affirmed the LIRC's decision on February 12, 1999 (App., *infra*, 14-22). Soldiers appealed to the Wisconsin Court of Appeals, District III, which affirmed the judgment of the Circuit Court on November 23, 1999 (App., *infra*, 3-13). Soldiers petitioned the Wisconsin Supreme Court to review, but that court declined by an order dated April 26, 2000, with two Justices dissenting from the Order (App., *infra*, 1-2). Soldiers now petitions the United States Supreme Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Several Criteria Motivating the Exercise of Certiorari Jurisdiction are Present in this Case.

The questions in this case are well within the criteria prompting the Court's certiorari jurisdiction.

First, both questions present real and significant questions of federal constitutional law under the First Amendment. With regard to the first question, narrow application of the statutory terms "church" and "primarily for religious purposes" raises profound risks of unconstitutional entanglement because of the intrusive inquiry such an application necessarily invites. Indeed, the governmental inquiry at every stage in this case precisely illustrates the inquiry forbidden by the Establishment Clause.

Second, the standard of review applicable to LIRC legal conclusions becomes deferential only on the basis of the LIRC's specialized knowledge and expertise. Unlike other areas where a state agency like the LIRC can gain such expertise over time, the statutory terms "church" and "primarily for religious purposes" implicate sensitive First Amendment concerns requiring *de novo* judicial review of LIRC decisions.

Third, the lower court decisions regarding both questions directly conflict with United States Supreme Court decisions holding that the Establishment Clause prohibits government from taking a side in a religious dispute. The decisions also directly conflict with decisions of the United States Supreme Court under which judicial inquiry creating *even just a risk* of an Establishment Clause violation is itself unconstitutionally entangling.

Fourth, there is long-standing uncertainty among various federal and state agencies and tribunals over how to apply statutory exemptions labeled "church" or "operated primarily for religious purposes." In some cases, the agencies and tribunals apply an appropriate analysis that does not offend the First Amendment. In the others,

however, the government actors directly enter a constitutionally forbidden zone of inquiry and commit, even if unwittingly, grievous constitutional violations.

The Court nearly had the opportunity to clarify these questions nearly two decades ago, in *California v. Grace Brethren Church*, 457 U.S. 393 (1982). However, the Court did not reach the merits of the First Amendment issues in that case because the petitioner sought an injunction in federal district court and did not first utilize the state law processes. Thus, the district court was deprived of jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. Accordingly, the Court could not properly review the district court's conclusion that the First Amendment prohibited the intrusive judicial inquiry threatened in that case. Finally, after nearly two decades, the Court is presented with a very suitable case in which the Court may clearly speak on these important matters.

In the Court's only other decision directly addressing the "church" exemption to unemployment compensation law, *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the Court held the state's interpretation of the term too narrow.

II. The First Amendment Requires a Broader Application of the Statutory Terms "Church" and "Primarily for Religious Purposes."

A. The definition of "church."

The term "church" is not defined in Wis. Stat., Ch. 108, or in 26 U.S.C. § 3309(b)(1), upon which Wis. Stat., § 108.02(15)(h)(1) is modeled.[1] Accordingly, the Court

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[1] Wisconsin's statute is not only modeled on FUTA, but also a function of it. FUTA imposes a tax upon wages paid by an employer in covered employment. 26 U.S.C. § 3301. Employers get a credit for the federal tax for contributions paid to a federally approved state unemployment compensation fund. 26 U.S.C. § 3302. State funds are reviewed and re-certified annually

may resort to a dictionary to ascertain the common and approved usage of an undefined term. The term "church" is defined:

1. A building for public and esp. Christian worship;
2. The clergy or officialdom of a religious body;
3. A body or organization of religious believers as:
    a. The whole body of Christians,
    b. Denomination,
    c. Congregation;
4. A public divine worship;
5. The clerical profession.

Webster's New Collegiate Dictionary 198 (1981).

The first listed definition of church is "a building for public and esp. Christian worship." Another definition is a "congregation." The LIRC and the Court of Appeals focused on another sub-definition "denomination." Peniel School is not a "denomination." Clearly, however, it is a "church."

As the Court of Appeals acknowledged, an ordained minister runs Peniel. It holds twice daily religious services, conducts communion services each week, and holds baptism services. And, it is incorporated as a church.

There can be no doubt that, at least part of the time, Peniel is a "church." And, Soldiers submits (as explained in more detail below), the judicial endeavor of separating out which of Peniel's activities are "church" activities, and which are not, would create unconstitutional entanglement, and must be rejected.

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by the Secretary of Labor to ensure compliance with the federal minimum standards of coverage. Therefore, whenever Congress amends FUTA, the states amend their statutes to preserve certification. Accordingly, interpretation of FUTA bears on the state statute. *See, e.g., DILHR v. LIRC*, 161 Wis.2d 231, 247-48, 467 N.W.2d 545 (1991).

B. The Wisconsin Court of Appeals has interpreted the words "church" and "primarily for religious purposes" narrowly, in a way which creates unconstitutional entanglement.

The Court of Appeals cited only two decisions in support of its narrow interpretation of the statutory term "church," (App., *infra*, 8-11) (citing *St. Martin Lutheran Evangelical Church v. South Dakota*, 451 U.S. 772 (1981) and *Nampa Christian Schools Foundation v. Idaho Dep't of Employment*, 719 P.2d 1178 (Idaho 1986)), and only two cases in support of its narrow interpretation of "primarily for religious purposes" (App., *infra*, 11-13) (citing *Nampa* and *Prince-Walker v. Industrial Claim Appeals Office*, 870 P.2d 588 (Colo. Ct. App. 1993)).

As an initial matter, the Court of Appeals clearly misapplied the Court's decision in *St. Martin*. Specifically, the court took from *St. Martin* the proposition that any institution where education takes place (i.e., a "school") cannot also be a church unless it is directly operated and controlled by a recognized church. *See* (App., *infra*, 9). The Court, however, clarified in *St. Martin*, that: "we disavow any intimations in this case defining or limiting what constitutes a church . . . " 451 U.S. at 784 n.15.

This erroneous use of *St. Martin* is aggravated by the fact that the case is best understood as *broadening, not narrowing*, the scope of the exemption by holding that "church" did not require a formal church building.

However, the constitutional problems with the Court of Appeals' decision are far more serious than mere misapplication of precedent. As explained below, the Court's decision in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) effectively overruled, on First Amendment grounds, any portion of *St. Martin* which might previously have provided even an arguable basis (however remote) for a narrow interpretation of the statutory term "church." Furthermore, the judicial inquiry applied in *Nampa* was itself unconstitutionally intrusive because the court abandoned the fundamental principle of neutrality. *Prince-Walker* similarly rested on an unconstitutional

foundation. Accordingly, the Court of Appeals has rested its decision on an entirely unconstitutional basis and the Court should grant certiorari in order to finally clarify the limits of constitutional inquiry in applying the "church" and "primarily for religious purposes" exemptions.

C. Laws should be construed so as to avoid unconstitutional application.

The Supreme Court has held that a legislative act ought not be construed to violate the constitution if any other possible construction remains available. *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, Chief J.). This fundamental rule of statutory interpretation has never been questioned and has been frequently reinforced. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (applying the rule and tracing it forward from *The Charming Betsy*).

In this case, the Court of Appeals correctly noted this principle, (App., *infra*, 8 n.2), but then neglected to apply it because the court somehow failed to see the *obvious* Establishment Clause dangers presented by narrow interpretation of the statutory terms "church" and "primarily for religious purposes." Accordingly, the Court should grant certiorari in this case in order to properly construe the statutory terms in a way that does not violate the First Amendment.

D. Any basis for narrow interpretation of the statutory terms that might have been derived from *St. Martin* or the Department of Labor letter presented to the Court of Appeals by LIRC was overruled on First Amendment grounds by *Amos*.

1. The *St. Martin* case.

In *St. Martin*, the Court interpreted the federal provision, 26 U.S.C. § 3309(b)(1) ("church" exemption from Federal Unemployment Tax Act or "FUTA") from which Wisconsin's § 108.02(15)(h)(1) is derived. The case arose

following a congressional amendment of FUTA which eliminated the exemption for employment "in the employ of a school which is not an institution of higher education." Unemployment Compensation Amendments of 1976, Pub.L. 94-566, § 115(b)(1), 90 Stat. 2670 (repealing former § 3309(b)(3)). The repeal of this exemption created wide-spread concern among church-related elementary and secondary schools regarding their status under the remaining exemptions for employment "in the employ of a church," § 3309(b)(1)(A), or in the employ of "an organization which is operated primarily for religious purposes," § 3309(b)(1)(B). *See* Employment and Training Administration, U.S. Department of Labor, Unemployment Insurance Program Letter No. 39-78 (May 30, 1978), reprinted in CCH Unemp. Ins. Rep. ¶ 21,522. (App., *infra*, 89-93).

2. DOL Letter invites intrusive inquiry.

The Court in *St. Martin* referred to a letter made public by the Secretary of Labor in 1978, regarding the amendments. 451 U.S. at 778 (citing Letter dated April 18, 1978, of Secretary Marshall to the Most Reverend Thomas C. Kelley, O.P., General Secretary, United States Catholic Conference) (App., *infra*, 94-101). The letter stated that the amendments extended FUTA coverage to all church-related school employment except for "strictly church duties," which remained within the "church" exemption. *See* (App., *infra*, 91-92) (describing content of Letter dated April 18); *see also* (App., *infra*, 78) (Appellate Brief for Defendant-Respondent (quoting Letter No. 39-78)). The letter elaborated that, even with regard to pastors, the "church" employment exemption was limited to "duties in the exercise of his ministry" (App., *infra*, 91-92).

Under these letters, the DOL would presumably find Pastor Sortedahl to be exempt while he is leading a worship service, administering the sacrament of baptism, serving communion, or performing other obviously

"church" functions; but would find him not to be exempt at other times.

3. Amos recognizes intrusive inquiry as unconstitutional under First Amendment.

The inquiry required to apply the kind of distinction made by the Secretary of Labor and emphasized by the Court in *St. Martin* was recognized as unconstitutionally intrusive by the Supreme Court decision in *Amos* six years later. In *Amos*, the Court upheld a 1972 amendment to the exemption from Title VII for religious organizations, 42 U.S.C. § 2000e-1, Civil Rights Act of 1964, Title VII § 702. The amendment extended the scope of the exemption from only the *religious* activities of such organizations, to *all* of their activities. The purpose of this amendment, in the words of sponsor Sen. Ervin, was "to take the political hands of Caesar off of the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972) (cited in *Amos*, 483 U.S. at 332 n.9).

Reviewing the constitutionality of the amendment,[2] the Court applied the three-step Establishment Clause analysis commonly identified with *Lemon v. Kurtzman*, 403 U.S. 602 (1971). At the first step, the Court held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. This locution implies that the narrowness of the unamended exemption did present "significant governmental interference." As the Court elaborated:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a

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[2] The Court stated no opinion whether the free exercise clause would require broad application of the exemption, in the absence of congressional action. 483 U.S. 327, 339 n.17.

> bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Id. at 336.

At the second step, the Court held that the amendment did not have a primary effect of advancing religion because it simply removed a burden allowing churches to advance religion; therefore, the government itself did not advance religion by amending the statute. *Id.* at 337.

> At the third step, the Court emphatically stated:
> It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and *avoids the kind of intrusive judicial inquiry into religious belief* that the District Court engaged in this case.

Id. at 339 (emphasis added). The concurring opinion of Justice Brennan provides some immediate guideposts for understanding at least one aspect of the prohibited inquiry:

> What makes application of a religious-secular distinction difficult is that *the character of an activity is not self-evident.* As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. *This results in considerable ongoing government entanglement.* Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. *While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.* A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. *A case-by-case analysis for all activities*

> *therefore would both produce excessive government entanglement with religion and would create the danger of chilling religious activities.*

Id. at 343-344 (emphases added).

The LIRC and the Court of Appeals in this case did exactly what the Supreme Court has forbidden. They have parsed what is a "church," and what is a religious purpose. This, they cannot do.

4. Amos negated DOL analysis relied on by the LIRC and the Wisconsin Court of Appeals.

After *Amos*, it is clear that a court (or administrative agency) cannot distinguish "strictly church duties" from other duties without engaging in an unconstitutionally intrusive inquiry. Nonetheless, the LIRC submitted the Department of Labor ("DOL") materials in the Appendix to its Brief in this case (items B and C), with the explanation that:

> Nothing could be clearer concerning the purpose and intent of the federal and Wisconsin statutes, particularly as it relates to the case at hand. The *U.S. Department of Labor's explanation shows* that the exclusion from unemployment compensation coverage for churches and church operated schools is to be narrowly construed
> . . . .

(App., *infra*, 78) (Brief for Defendant-Respondent, LIRC) (emphasis added).

In light of the reasoning in *Amos* it is doubtful that there was *ever* a time when the DOL materials could have provided persuasive support for a narrow interpretation of the terms "church," or "operated for primarily religious purposes," without offending the First Amendment. It is clear that, after *Amos*, the DOL explanation has no validity as a guide for interpreting the statutory terms.

5. A court cannot criticize a lack of unconstitutional evidence.

In this light, reliance by the Wisconsin Court of Appeals on the "striking lack of evidence necessary to show that Peniel was a church," (App., *infra*, 10-11), is also an unconstitutional basis of decision. A court cannot criticize the state of the record on the basis that it lacks certain evidence when the missing "evidence" is of a type for which no government tribunal is authorized to ask in the first instance.

The LIRC and the Court of Appeals pointed to three things as evidence that Peniel is not a church: that it follows "no particular doctrine;" that it is nondenominational; and that there is a "void of evidence describing exactly what constituted Christian Services at Peniel [which] rendered the significance of the services hollow" (App., *infra*, 9-10).

As explained below, a significant body of Christianity follows a nondenominational, Bible-based theology. This body is a major, historically significant part of modern American Christianity. Under the kind of reasoning advocated by the government agency and accepted by the state courts in this case, millions of Christians who identify themselves with nondenominational, strictly Bible-based worship have just learned that the churches they attend are not "churches" after all.

When Christians hear "nondenominational," and "non-doctrinal, just the Bible," they know what this means. While Soldiers is certain the LIRC meant no offense, its (and the Court of Appeals') implicit holding that a nondenominational entity that preaches, "just the Bible," has no doctrine and is therefore not a "church," *is* offensive, and it is wrong.

The Wisconsin Court of Appeals attacked the "striking lack of evidence necessary to show that Peniel was a church" (App., *infra*, 11). Well, what could Soldiers have done to cure this alleged defect in its appearance at the hearing? Put on witnesses explaining the place of

nondenominationalism and Bible-based theology in modern Christianity?

Should Peniel have offered testimony explaining each part of its religious services, and what they mean to the faithful? Should Peniel have explained how Holy Communion is conducted and what it means? Baptism? Bible readings? Prayers? Psalms? This is a frightful thought. Yet this is precisely the kind of intrusive inquiry the LIRC demanded of Peniel in its arguments before the Wisconsin courts:

> What teachings of the Bible are preached, and how often? What transpires during the cross-denominational Christian services, which apparently would be acceptable to those of the Jewish faith as well as those of no denomination? Are students required to attend these services? Under what religious authority were baptisms conducted, and who attended them? Under what religious authority is communion distributed each Monday, and what does communion mean to Mr. Sortedahl?

(App., *infra*, 119) (LIRC's Brief in Wisconsin Circuit Court). *See also* (App., *infra*, 70) (LIRC's Brief in Wisconsin Court of Appeals). To fix the "striking lack of evidence," Peniel would have had to put on a show that would have violated every sense of *Amos*.

E. The LIRC confused the constitutional analysis of the Wisconsin Court of Appeals by raising a false issue.

The LIRC also obscured the constitutional issues in the Wisconsin Court of Appeals by raising the false issue of the purpose and intent of unemployment compensation law and separating it from the issue of excessive entanglement (App., *infra*, 76-79). Soldiers has never disputed that the purpose and intent of unemployment compensation law is remedial and that therefore its exemptions are *generally* to be construed narrowly. Rather, the issue, which the Court of Appeals seems to have wholly overlooked (with

the LIRC's assistance), is whether application of the particular exemptions labeled "church" and "primarily for religious purposes" require greater breadth in order to avoid an inquiry that would excessively entangle church and state.

The most elementary principles of constitutional law dictate that, if narrow application of the exemption violates the Establishment Clause, then the general purposes and intent of the legislative scheme are completely irrelevant because the constitutional prohibition trumps the executive and judicial prerogative to manifest the asserted intent of the legislature.[3] In other words, a legislative body certainly *can* create an exemption from generally applicable law for churches or organizations operated primarily for religious purposes, but it *cannot* narrowly define the terms "church" or "primarily for religious purposes" in a manner that requires courts or executive agencies to engage in unconstitutionally intrusive inquiry.

Neither could the legislature achieve such an end indirectly by leaving it to the judiciary to narrowly interpret an ambiguous term, in a manner which would be unconstitutional if it had been stated unambiguously by the legislature in the first instance. Hence, the rule: a law should be interpreted in such a way as to avoid its unconstitutionality. The Court should grant certiorari in this case because the Wisconsin Court of Appeals is only the latest

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[3] Distinguish this from scenarios where a general law contains no religious exemption and adherence to the general scheme is argued to impede the free exercise of religion. In those cases, an exemption is not constitutionally required if the legislature had a rational basis for the general scheme. *See, e.g., Employment Div. v. Smith*, 496 U.S. 913 (1990); *see also City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993, at least as applied to the states). *Amos* has been applied after *Flores* in order to test the Establishment Clause validity of RFRA as applied to federal law. *See Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998).

example of government tribunals failing to act within these constitutional parameters in the absence of the Court's clear guidance.

F. The Wisconsin Court of Appeals abandoned the fundamental Establishment Clause principle of neutrality when it narrowly interpreted the terms "church" and "primarily for religious purposes" in this case.

Both the Court of Appeals and the LIRC pointed to the fact that Peniel is nondenominational, and that it does not teach the "doctrine" of any particular denomination. It teaches "just the Bible." The LIRC and the Court of Appeals heard this, and formed a wrong, prejudicial, and biased opinion that what they heard was "non-church." The error is as clear as if the witnesses and judges had been speaking different languages.

1. Neutrality is at the heart of the Establishment Clause.

The First Amendment principle of neutrality as between religious groups is very well settled. In *United States v. Ballard*, 322 U.S. 78, 87 (1944), the Supreme Court stated (emphasis added):

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same

> can be done with the religious beliefs of any sect. *When the triers of fact undertake that task, they enter a forbidden domain.* The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Similarly, in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970), the Court placed emphasis on the fact that the state's property tax exemption "has not singled out one particular church or religious group or even churches as such; rather it has granted exemption to all houses of religious worship. . . . " Justice Harlan's concurrence elaborated, at 696 (emphasis added):

> The statute also satisfies the requirement of neutrality. Neutrality in its application requires an equal protection mode of analysis. *The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.* In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

See also Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects. . . . "); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Moreover, neutrality is more than just one among many well settled Establishment Clause principles; *it is the core principle*. As the Supreme Court has elaborated:

> The *clearest command* of the Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution, religious establishments of differing denominations were common throughout the Colonies. But the Revolutionary generation emphatically disclaimed that European legacy, . . . [leading to] the abolition of most denominational establishments at the state level by the 1780's and [leading] ultimately to the inclusion of

the Establishment Clause in the First Amendment in 1791.

> This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." [citation to Federalist No. 51] Madison's vision – *freedom for all religion being guaranteed by free competition between religions* – naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But *such equality would be impossible in an atmosphere of official denominational preference.* Free exercise thus can be guaranteed only when legislators – and voters – are required to accord to their own religions *the very same treatment given to small, new, or unpopular denominations.* * * *

Larson v. Valente, 456 U.S. 228, 245-246 (1982) (emphases added); *see also Gillette v. United States*, 401 U.S. 437, 449 (1971) ("perhaps the central purpose of the Establishment Clause" is "ensuring governmental neutrality in matters of religion"); *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("that the legislature itself may fail to exercise governmental authority in a religiously neutral way [implicates] a principle at the heart of the Establishment Clause, that government should not prefer one religion to another. . . . ").

2. The cases cited by the Court of Appeals for narrow interpretation of the statutory terms are unconstitutional because they abandoned the fundamental principle of neutrality.

Aside from *St. Martin*, the Court of Appeals cited only two other cases in support of its narrow interpretation of the terms "church" and "primarily for religious

purposes." These cases, especially *Nampa*, provide model examples of how a court can blindly ignore the warning signs of *Amos* and trespass into the forbidden zone of inquiry.

In *Nampa*, the Supreme Court of Idaho interpreted that state's FUTA derived analog identical to Wisconsin's § 108.02(15)(h). To interpret the statutory term "church," the court explicitly relied upon fourteen factors used to identify a "church," as presented in a speech by IRS Commissioner Jerome Kurtz on Jan. 9, 1978. *See* 719 P.2d at 1182.

Several of these factors invite the intrusive inquiry which is forbidden under *Amos*. Most relevant to the present case, the Idaho court relied on IRS factor number four, "a formal code of doctrine or discipline," in order to define "church." The entity in *Nampa* required members of the corporation directing the school, as well as all teachers, to have the following thirteen beliefs:

> (1) in the Holy Scriptures, (2) in the one triune God, (3) in the Lord Jesus Christ, (4) in the Holy Spirit, (5) in the creation and fall of man, (6) in salvation by grace through faith, (7) in righteous living and good work, (8) in the existence of Satan, (9) in the second coming of Christ, (10) in future life, bodily resurrection and eternal judgment, (11) in one true Church, (12) in separation from the world, and (13) in educating young people according to the foregoing principles and teaching in a non-denominational manner.

Id. at 1179 n.1. Despite this required Statement of Faith, the court stated, in applying the fourth IRS factor, that:

> The purpose behind Nampa Christian is not so much to declare a specific body of doctrine, as it is to provide students with a religious education that supports the body of doctrine with which a wide number of fundamentalist churches can agree. Thus, the fourth factor weighs against Nampa Christian being a "church."

Id. at 1182. Elsewhere, the court emphasized that "a tenet of the School's Statement of Faith, in fact, is that the school remain nondenominational." *Id.* at 1183.

On the basis of these portions of the analysis alone it is readily apparent that the inquiry in *Nampa* crossed the constitutional line drawn by the Establishment Clause because it abandoned the principle of neutrality as between religious groups. Specifically, the court's holding necessarily implies that any set of beliefs "with which a wide number of fundamentalist churches can agree" is excluded from that category which a court labels "doctrine."[4] As such, this pronouncement displays an obvious (if not conscious or malicious) bias for mainline denominational conceptions of "church" and against non-traditional, nondenominational conceptions of "church."

Prince-Walker is less obviously violative. Still, the court relied on the DOL letter from *St. Martin* to support a distinction between religious "purposes" and "motivations," which corresponds to the entanglement fears recognized by *Amos*.

3. The Court of Appeals, the Circuit Court, the LIRC, and the ALJ all abandoned neutrality in this case.

The government actors at each step in this case have abandoned the neutrality between religious groups which is required by the Establishment Clause by demonstrating a clear prejudice against nondenominational Christian churches and Christian churches where the Bible, standing alone, serves as an authoritative statement of "doctrine."

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[4] The dictionary definition of "doctrine" includes: 1. Something that is taught; 2. A principle or body of principles presented for acceptance or belief, as by a religious, political, scientific, or philosophic group; dogma. American Heritage Dictionary, 2nd College ed. 1985. The Statement of Faith in *Nampa* would easily have been within this definition. So, too, would the preaching of "just the Bible" at Peniel.

a. Statements of the government actors in this case demonstrate prejudice against nondenominational and Bible-based churches.

The ALJ stated, "Although nondenominational services are held, there is no church located on the premises, nor are any services of any denomination conducted on the premises . . . " (App., *infra*, 41-42). In its decision, the LIRC stated, (App., *infra*, 25; 34):

> The employer just preaches the Bible in its services. The employer does not follow any doctrine nor does it criticize any doctrines. The employer considers the school to be 'cross-denominational.' It takes students of any denomination or no denomination. * * * Certainly, the evidence presented by the employer doesn't establish that (2) through (9) and (13) and (14) [of the IRS factors] have been met.

The Circuit Court stated, (App., *infra*, 21):

> Though professing to be operated primarily for religious purposes, the plaintiff is unable to identify with any specificity the precise role of religion in its "Christian curriculum," and, in fact, undercuts its position elsewhere by referring to itself as "cross-denominational" and not supported by "any one certain denomination."

The Court of Appeals stated as a "fact" that Peniel "does not preach any particular doctrine," (App., *infra*, 4-5), despite the record evidence that Peniel "just preaches the Bible" (App., *infra*, 12; 16; 57; 107). This is not a fact, but a legal conclusion.

The reasoning of the Court of Appeals, as well as each of the tribunals below, implies that any teaching derived "just from the Bible" is excluded *per se* from that category which a court labels "doctrine" and that nondenominational worship services are excluded *per se* from that category which a court labels "church." By so reasoning, the court has very definitely declared a preference against a

vast number of contemporary nondenominational Christian churches and churches who view the Bible, standing alone, as the definitive statement of their doctrine.

b. Proper historical context shows how the Court of Appeals and all lower tribunals in this case displayed favoritism in a dispute between religious groups.

The Court of Appeals, and all lower tribunals in this case, have been trying to apply judicial conceptions of "churchness" in the same manner that Plato would discuss a chair. Such analysis might work when "chairness" is at issue, but the Establishment Clause has never been applied in such an historical vacuum. The Court regularly draws from the richness of historical detail and circumstance in order to properly apply the Establishment Clause. Accordingly, Soldiers now explicitly informs the Court of the relevant history, of which the Court may properly take judicial notice, so that the constitutional violation may be clearly seen.

(i) Nondenominational and Bible-based churches have deep roots in Protestant and American history.

The debate over the weight to be accorded to the actual text of the Bible, standing alone, has deep historical antecedents in the Christian tradition. For example, "Calvin deprecated Luther's tendency to find an edifying point in biblical texts without first subjecting those texts to hard and critical analysis."[5] Indeed, *sola scriptura* ("the scripture alone") is understood as:

> [A] principle that has dominated Protestant conservatives since the Reformation. Most Protestants would have been willing to follow William Chillingworth's slogan: "The Bible, I say, the

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[5] David C. Steinmetz, Luther in Context, Chapter VIII: Luther and Calvin on Church and Tradition 85 (1995).

> Bible only, is the religion of Protestants." Some contemporary Evangelicals still accept that view.[6]

During the nineteenth century in America, this debate was reflected by the rise of "Restorationists," referring to the development of at least three initially separate movements known as the Mormons (led by Joseph Smith), the Disciples of Christ (led by Thomas Campbell and his son Alexander), and the Christians (led by Barton Stone). Although the Mormon variation on restoration included introduction of an additional canonical text (known as the Book of Mormon), the Disciples of Christ and the Christians joined forces following a summit during the Christmas season of 1831-1832 and embarked upon:

> . . . a new campaign to rid American Christianity of its confusing welter of denominations, and to restore instead the pristine, primitive church of New Testament times. Deliberately they avoided any restrictive denominational name . . . [T]hey were filled with optimism that they could transcend the factionalism of contemporary Protestant Christianity and return to Christian origins.
>
> Key to this nascent Stone-Campbell tradition was the assurance that Scripture could be taken as an unambiguous roadmap for contemporary belief, practice and organization. "Where the Scriptures speak, we speak; and where the Scriptures are silent, we are silent" was an early motto of Thomas Campbell that became authoritative for the whole movement. Their desire was to escape from "man-made" devices such as creeds and denominational structures, and literally restore the way in which Jesus and his disciples lived and worshipped.[7]

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[6] Frederick W. Norris, The Apostolic Faith: Protestants and Roman Catholics 35 (1992).

[7] Peter W. Williams, America's Religions: Traditions and Cultures 212 (1998).

As the nineteenth century went forward, dispensationalist[8] teachers defended their literalistic approach to Biblical text as:

> . . . simply that of common sense. Since it was based on laws of language and meaning which were common to all people, the method was especially appropriate for "the common man." . . . "I insist," said Professor Jerry Lummis (of Lawrence College, Wisconsin) . . . "that the New Testament statements conform to the laws of language as truly as do those of Xenophon." We should expect no "mystical" language with "secret or hidden meaning." . . . "In ninety-nine out of a hundred cases," concurred Reuben Torrey, "the meaning that the plain man gets out of the Bible is the correct one."
>
> The belief that the facts and laws they were dealing with were matters of common sense was basic to the dynamics of the movement. . . . Esoteric, complicated, mystical, allegorical, and other fantastical interpretations were the characteristic productions of theology professors, especially Germans. Their own scheme was by contrast presented as simple and straightforward. . . . Fundamentalism did not develop in seminaries, but in Bible conferences, Bible schools, and, perhaps most importantly, on the personal level of small Bible study groups where the prophetic truths could be made plain.[9]

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[8] "Dispensationalism" refers to the sharp separations of the various historical eras, or dispensations, recounted or predicted in the Bible. George M. Marsden, Fundamentalism and American Culture: The Shaping of Twentieth Century Evangelicalism 1870-1925 54 (1980).

[9] *Id.* at 61-62.

(ii) Rise of modernism and Darwinism produced tension inside the denominations.

At the turn of the century, the debate over the proper use of the Bible, standing alone, was sharply intensified by the rise of "modernism" (or "theological liberalism") and Darwinism. One aspect of the rise of modernism was rigorous analysis of the form, text, and sources of Biblical text, referred to as "Biblical higher criticism." Applying Biblical higher criticism, the modernists concluded, *inter alia*, that the Bible was not infallible, that miracles reported in the Bible did not actually occur, and that man was not really made in God's image. This last view was closely related to the rise of Darwinism, according to which man was just another animal subject to natural selection.

"Fundamentalism" developed as a militant reaction to these developments:

> "Modernism," President James M. Gray of Moody Bible Institute stated flatly, "is a revolt against the God of Christianity." . . . "The evolutionary hypothesis," declared William Jennings Bryan in a similarly sweeping statement, "is the only thing that has seriously menaced religion since the birth of Christ. . . . "[10]

Tensions began to develop within the established denominations over whether, and how, to reconcile the text of the Bible with modernism and Darwinism. These tensions did not immediately escalate to the point where anti-moderns felt compelled to change or leave the denominations:

> An important reason that most American dispensationalists did not consider separation from their denominations a necessary consequence of their belief, was that *they thought of religion primarily in terms of individuals rather than institutions. The important spiritual unit was the*

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[10] *Id.* at 4.

> *individual. The church existed as a body of sanctified individuals united by commitment to Christ* and secondarily as a network of ad hoc spiritual organizations.[11]

(iii) Monkey Trial was the decisive moment in "Battle for the Bible."

After the War, the tensions began to become more distinctly characterized as a "battle for the Bible." The leading conservative Baptist theologian, Augustus H. Strong, declared that the Baptists were:

> . . . losing our faith in the Bible. * * * The unbelief in our seminary teaching is like a blinding mist which is slowly settling down upon our churches, and is gradually abolishing, not only all definitive views of Christian doctrine, but also all conviction of duty to 'contend earnestly for the faith' of our fathers.[12]

The conception of a "battle to save the Bible" from the modernists most clearly crystallized beginning in late 1920, when Williams Jennings Bryan championed the cause of anti-evolution. Although anti-evolution itself did not become a primary point of conflict in the internal denominational struggles, the meteoric rise of the issue in popular culture attracted large numbers into the fundamentalist campaign to keep Darwinism out of America's schools.[13]

Nonetheless, the fundamentalists would be forced to surrender the denominational front in the battle for the Bible within five years, largely because of one watershed event:

> It would be difficult to overstate the impact of "the Monkey Trial" at Dayton, Tennessee, in transforming fundamentalism . . . in the trial by

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[11] *Id.* at 70-71 (emphasis added).

[12] *Id.* at 166.

[13] *Id.* at 169-170.

> public opinion and the press, it was clear that the twentieth century, the cities, and the universities had won a resounding victory, and the country, the South, and the fundamentalists were guilty as charged. * * * The fundamentalist cause was synonymous with rural backwardness. * * * Whatever they said would be overshadowed by the pejorative associations attached to the movement by the seemingly victorious secular establishment.[14]

(iv) Exodus: those clinging to the Bible in the face of modernity and Darwin leave the denominations.

The decade following "the Monkey trial" saw the departure from the denominations of small minorities of conservative splinter groups who rejected modernism and adhered to Biblical inerrancy. Some of these formed new denominations while many others simply became independent congregations. For many of these churches, "separation became a new test of faith." Thus:

> Fundamentalism, while fading from the reputed centers of American life since 1925, was in fact taking solid root in other, less conspicuous areas. The movement had entered into a distinct new phase. The effort to purge the leading denominations having failed, the leadership now re-emphasized working through local congregations, and independent agencies, such as Bible schools and mission organizations. Local pastors, often independent from major denominations either formally or simply in practice, built fundamentalist empires both large and small. With all the variety fostered by American religious free enterprise, countless groups were formed to promote the causes that national fundamentalism had recently publicized.[15]

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[14] *Id.* at 184-188.

[15] *Id.* at 193-194.

When placed in historical context, it is clearly impossible to reconcile the kind of judicial analysis applied by the government actors at each step in the progress of this case with the core Establishment Clause principle that the government shall not take a side in a religious dispute. Indeed, the risk of such judicial mistakes is the reason that intrusive inquiry *itself* constitutes excessive entanglement. Accordingly, the Supreme Court should grant review in order to clarify that the First Amendment requires a broader interpretation of the statutory terms "church" and "primarily for religious purposes."

III. The First Amendment Precludes a State Agency Like the LIRC From Ever Having Special Knowledge or Expertise in Applying the Terms "Church" and "Primarily For Religious Purposes" and Therefore Necessitates *De Novo* Judicial Review.

The Wisconsin Supreme Court has clarified three levels of deference for state appellate courts to apply when reviewing the statutory interpretation contained in agency decisions. *See Jicha v. DILHR*, 169 Wis.2d 284, 485 N.W.2d 256 (1992). The Wisconsin Court of Appeals summarized the analysis, in *Hill v. LIRC*, 184 Wis.2d 101, 109-10, 516 N.W.2d 441 (1994) as:

> First, if the agency's experience, technical competence and specialized knowledge assist the agency in applying the statute, the agency's interpretation receives great weight. Second, if the agency's decision is very nearly one of first impression, it will be given due weight or great bearing. Finally, where it is clear that the case is one of first impression for the agency and the agency lacks special expertise in deciding the question presented, the review is *de novo*.

The Court of Appeals held that the due weight standard applied in this case because "this is not the first time the commission has interpreted § 108.02(15)(h), Stats"

(App., *infra*, 6). Petitioner argued in the Wisconsin courts, but cannot argue to this Court, that the *de novo* standard was required under Wisconsin law.

However, the *de novo* review standard was not only required by proper application of Wisconsin law, but also by the First Amendment to the United States Constitution.

As shown above, there are certain areas of inquiry where even the highest courts in the land are forbidden to enter. It is also clear, as explained above, that the LIRC, the Circuit Court and the Court of Appeals crossed the line in this case by abandoning the fundamental principle of neutrality between religious groups.

If these premises are accepted, then it follows *a fortiori* that the LIRC is constitutionally forbidden from developing expertise and specialized knowledge in this area. Any narrow application of the statutory terms "church" and "primarily for religious purposes" is, by nature, an activity fraught with constitutional risks. Indeed, the LIRC applied an unconstitutional analysis in the very case relied upon by the Court of Appeals to justify application of the "due weight" standard, *MHS, Inc.*, U.C. Hearing No. 8852 (July 11, 1991) (App., *infra*, 82-89). The LIRC's analysis in that case was entirely structured on the analysis in *Nampa*, which is clearly unconstitutional.

Judicial review of the constitutional parameters of agency inquiry into such questions cannot be restrained by artificial resort to common law principles of agency deference. No matter how many times the LIRC interprets the exemptions in § 108.02(15)(h), courts of law will always retain jurisdiction to review, *de novo*, whether the agency has exceeded the bounds of constitutional inquiry in so doing. The Court should grant certiorari in this case to clarify this important constitutional principle.

IV. Government Agencies and Tribunals Can Guard Against Abuse of the Church Exemptions Without Entering the Constitutionally Forbidden Zone of Inquiry.

Although practical results that might flow from a constitutional prohibition should theoretically not affect the existence of the prohibition itself, the Court may be understandably hesitant to declare without limitation that the term "church" must be broadly construed.

Soldiers recognizes that unscrupulous parties may purport to be a "church" merely as a façade to evade unemployment compensation (or taxation) obligations. However, Soldiers' review of relevant case law reveals that government tribunals in a variety of contexts have shown an ability to limit "church" exemptions without entering into unconstitutional areas of inquiry.

The appropriate analysis does not inquire whether certain positive elements of "churchness" are present, but instead asks directly whether any indicia of fraud or sham are present. Corporate veil piercing provides a useful illustrative analog. Individuals may hide behind a corporate façade in order to avoid personal liability. In determining whether to pierce the veil, courts do not first inquire into the "corporateness" of the entity, but rather look directly for indicia of sham.

Similarly, individuals may hide behind a church façade in order to evade unemployment compensation or taxation obligations. Here too, courts may forego an analysis of "churchness" and look instead for indicia of sham. For example, in *Pollard v. IRS*, 786 F.2d 1063 (7th Cir. 1986), the government was able to identify an obvious sham without getting into a constitutionally sensitive discussion about doctrine, communion, or the entity's relationship to a denominational super-structure. *See also American Assoc. of Christian Schools Voluntary Employees Beneficiary Assoc. Welfare Trust Plan v. United States*, 850 F.2d 1510 (11th Cir. 1988) (independent trust entity was set up for the sole purpose of extending benefits in return

for premiums received and thus not within the exemption).

Similarly, where a sham or inappropriate claim of exemption is not quite so obvious, courts can employ a more sophisticated non-inurement analysis in order to determine whether or not an entity will receive the benefit of a claimed exemption. *See, e.g., Bubbling Well Church of Universal Love, Inc. v. IRS*, 670 F.2d 104 (9th Cir. 1981); *Church by Mail, Inc. v. IRS*, 765 F.2d 1387 (9th Cir. 1985).

In sum, the experience of courts like these demonstrates the competence and ability of government tribunals to prevent abuse of the church exemptions without entering the constitutionally forbidden zone of inquiry. Thus, the Court's decision to grant certiorari and clarify the boundaries of permissible inquiry by reversing the Wisconsin Court of Appeals in this case would not open Pandora's box. Indeed, it would help to close such a box that has already been opened.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Dated this 25th day of July, 2000.

Respectfully submitted,

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April 26, 2000

To:

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You are hereby notified that the Court has entered the following order:

No. 99-0846 *Soldiers of Jesus Christ, Inc. v. LIRC, et al.*
L.C.#98CV187

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Soldiers of Jesus Christ, Inc., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Bablitch, J., and Crooks, J., dissent.

Cornelia G. Clark
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and Rule 809.61, Stats.

No. 99-0846

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

Soldiers of Jesus Christ, Inc.,

Plaintiff-Appellant,

v.

Labor and Industry Review Commission, Department of Workforce Development and Kenneth H. Kube,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for St. Croix County:

C. A. RICHARDS, Judge. *Affirmed*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶ 1 PER CURIAM. Both the circuit court and the Labor and Industry Review Commission determined that Soldiers of Jesus Christ, Inc., is not exempt from paying unemployment compensation. Soldiers now appeals the circuit court judgment. We also conclude that Soldiers is not exempt from paying unemployment compensation under § 108.02(15)(h), STATS., either as: (1) a church; or (2) an organization operated primarily for religious purposes and principally supported by an association of churches. We therefore affirm the judgment.

FACTS

¶ 2 The facts are mainly undisputed. Kenneth Sortedahl has directed Soldiers since it was incorporated in 1971. Sortedahl testified that Soldiers runs a boarding school called Peniel Christian School. Soldier's purpose, according to its amended articles of incorporation, "is to operate and maintain a Christian children's boarding school and church."

¶ 3 Peniel focuses on students with behavioral problems, such as children who have been in trouble with the law or in their homes. Students generally stay at Peniel for a year, living and working on school property. Peniel is funded primarily by donations and is supported by churches of various denominations. It does charge tuition, but students are not always required to pay the entire amount.

¶ 4 Peniel uses a "Christian curriculum," but does not preach any particular doctrine. Students are accepted from any denomination or no denomination at all. Christian services are held at Peniel twice a day in the meal

area after the tables are cleared. Peniel has baptism services on its grounds and is open to having visitors come to services. Sortedahl is a Lutheran pastor, but he does not preach Lutheran doctrine at Peniel.

¶ 5 Kenneth Kube worked for Soldiers from November of 1993, until August of 1994, performing telemarketing, fund-raising and construction work. After leaving Soldiers, Kube applied for unemployment compensation benefits. A deputy of the Department of Workforce Development[1] issued an initial determination finding that Soldiers was exempt from paying unemployment compensation. Kube appealed, and an administrative law judge reversed. Soldiers appealed to the commission, which affirmed the administrative law judge's conclusion while modifying the findings. Soldiers appealed, the circuit court affirmed and this appeal ensued.

STANDARD OF REVIEW

¶ 6 We review the commission's decision, rather than the decision of the circuit court. *See* ***Knight v. LIRC***, 220 Wis.2d 137, 147, 582 N.W.2d 448, 453 (Ct. App. 1998). Soldiers does not dispute any particular factual findings and LIRC does not dispute that our review involves a question of law. Soldiers contends that we should review the commission's decision de novo because it involves the application of law that is one of first impression. *See*

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[1] The Department of Industry, Labor and Human Relations was renamed the Department of Workforce Development effective July 1, 1996.

id. The commission claims that its determination is entitled to "great weight" deference because its factual findings and legal conclusions are closely intertwined. *See* ***Barron Elec. Coop. v. PSC,*** 212 Wis.2d 752, 761, 569 N.W.2d 726, 731 (Ct. App. 1997).

¶ 7 There are three levels of review for commission decisions: (1) great weight deference, (2) due weight deference, and (3) de novo review. *See* ***UFE v. LIRC,*** 201 Wis.2d 274, 285, 548 NW.2d 57, 61 (1996). A de novo standard is only applicable when the issue is one of first impression to the commission, *see* ***id.*** at 285, 548 N.W.2d at 62, or when the commission's position on an issue has been so inconsistent so as to provide no real guidance. *See* ***Marten Transp. Ltd v. DILHR,*** 176 Wis.2d 1012, 1018-19, 501 N.W.2d 391, 394 (1993). This is not the first time the commission has interpreted § 108.02(15)(h), STATS. *See* ***MHS, Inc.,*** UC Hearing No. 8852 (July 12, 1991). Soldiers does not claim that the commission's interpretation of § 108.02(15)(h), STATS., has been inconsistent. Therefore, it would be inappropriate to apply a de novo standard of review in this case.

¶ 8 In order for us to grant an agency interpretation great weight deference, as urged by the commission, all four of the following requirements must be met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Harnischfeger Corp. v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). The commission's experience with § 108.02(15)(h), STATS,, does not satisfy the second requirement of the *Harnischfeger* test. The commission has cited only one other decision involving a similar issue and its interpretation of § 108.02(15)(h).

¶ 9 The middle level of agency review is due weight deference. We apply due weight deference when:

> the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court. The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question.

UFE, 201 Wis.2d at 286, 548 N.W.2d at 62. This is the situation here. We therefore accord the commission's interpretation in this case due weight deference. We will not overturn a reasonable decision if it furthers the purpose of the statute, unless we determine that there is a more reasonable interpretation under the facts. *See id.* at 286-87, 548 N.W.2d at 62.

ANALYSIS

¶ 10 Wisconsin's unemployment compensation law exempts employers from paying unemployment compensation for services:

> 1. In the employ of a church or convention or association of churches; [or]

> 2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches . . . .

Section 108.02(15)(h), STATS.

I. CHURCH

¶ 11 Soldiers contends it is exempt as a church under subd. 1 of § 108.02(15)(h), STATS. It urges a broad definition of "church,"[2] claiming it qualifies based on its Christian curriculum, its religious services, its leadership by a Lutheran minister, and its description of itself as both a church and school in its amended articles of incorporation.

¶ 12 Soldiers correctly observes that a church is not confined to the existence of a physical house of worship. In *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the United States Supreme Court analyzed the federal counterpart to § 108.02(15)(h)1, STATS.,[3] and held that the religious schools in that case were exempt because: (1) the schools were not separately incorporated from the churches which operated them; and (2) the churches directly controlled, supervised and financed the schools' operations.

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[2] We construe the statute broadly to avoid raising doubts of its constitutionality. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981).

[3] The federal counterpart to § 108.02(15)(h), STATS., is the Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3309(b).

See id. at 788. The Court held that "church" is not "synonymous solely with a physical building that is a house of worship . . . . " *Id.* at 784. Rather, the word "church" must be construed "to refer to the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing church employees." *Id.* Therefore, a church, as an employer, must exist before an organization it directly controls is exempt under § 108.02(15)(h)1, STATS.

¶ 13 Neither Peniel nor its employees are directly operated, controlled or employed by any branch of the Lutheran Church, of which Sortedahl is a pastor, or of any other church of any other denomination. Soldiers argues that it is a church within the broader Christian sense, but just because it provides a Christian environment and calls itself a church in its articles of incorporation does not make it a church.

¶ 14 We note that Soldiers has cited no case in which a school was *defined* as a church without being directly operated and controlled by a recognized church, as were the schools in ***St. Martin.*** In fact, in a case Soldiers relies on in its alternative argument, the Idaho Supreme Court concluded that even a school with a primary religious purpose could not be separately *defined* as a church. *See* ***Nampa Christian Schs. Found. v. Idaho Dept of Employment,*** 719 P.2d 1178 (Idaho 1986).[4]

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[4] In ***Nampa Christian Schs. Found. v. Idaho Dep't of Employment,*** 719 P.2d 1178 (Idaho 1986), the commission relied on a list of fourteen factors the IRS has developed which it applies to individual organizations when determining whether an organization is a church. These factors are:

¶ 15 The commission found that the "lack of evidence in this case of the role of religion in the employer's existence . . . is striking." The commission concluded that Peniel has no ecclesiastical government. Although Peniel holds Christian services twice a day in the meal area, the commission also found that Peniel does not follow any particular doctrine. In fact, there was a void of evidence describing what exactly constituted Christian services at Peniel, and this void rendered the significance of the services hollow. Although testimony established that Peniel is open to having visitors at its services, the commission noted that no evidence established that visitors actually attended or even were aware of the services.

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(1) A distinct legal existence;

(2) a recognized creed and form of worship;

(3) a definite and distinct ecclesiastical government;

(4) a formal code of doctrine and discipline;

(5) a distinct religious history;

(6) a membership not associated with any other church or denomination;

(7) an organization of ordained ministers;

(8) ordained ministers selected after completing prescribed studies;

(9) a literature of its own;

(10) established places of worship;

(11) regular congregations;

(12) regular religious services;

(13) Sunday schools for religious instruction of the young; and

(14) schools for the preparation of ministers.

While we do not necessarily disagree with these criteria, we do not adopt them on this appeal.

¶ 16 We determine that there is no other application of § 108.02(15)(h)1, STATS., to the commission's factual findings that would be more reasonable than the commission's. Soldiers does not challenge the commission's factual findings and, given the striking lack of evidence necessary to show that Peniel was a church, we conclude that Soldiers is not exempt under § 108.02(15)(h)1, STATS.

II. ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES

¶ 17 Soldiers also argues that it is exempt under § 108.02(15)(h)2, STATS., because it is operated primarily for religious purposes and is principally supported by an association of churches. We are satisfied the record demonstrates that Soldiers is not operated primarily for religious purposes. As a result, it is not necessary for us to decide whether it is principally supported by an association of churches.

¶ 18 The word "primarily" has been construed by other jurisdictions interpreting similar statutes to mean "of first importance," "essentially" or "fundamentally" as opposed to "secondarily" or "merely incidental." *See* ***Prince-Walker v. Industrial Claim Appeals Office,*** 870 P.2d 588, 591 (Colo. Ct. App. 1993). Here, the commission concluded that "the primary objective of [Soldiers] is keeping kids out of trouble while providing an education and room and board."

¶ 19 At its root, Soldiers' argument on this issue involves a dispute over the weight of the evidence before the commission. First it cites the commission's statement

that the school is "religious in nature."[5] Then it highlights specific evidence, including religious services being held twice a day, the Bible being preached, use of a Christian curriculum, holding of baptismal services, its self-description as a "Christian School," and its leadership by a Lutheran minister.

¶ 20 Nevertheless, we agree with the commission's conclusion. Peniel is first and foremost a school. The evidence does not establish that religion is of first importance or fundamental to the operation of the school. As the commission observed:

> [T]here is a lack of testimony about the precise role of religion in the school's curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it difficult to find that the school operates **primarily** for religious purposes.

¶ 21 For example, Sortedahl testified that the school uses a "Christian curriculum." The commission noted, however, that it "simply does not know what constitutes a 'Christian' curriculum." There is no evidence in the record explaining what Peniel considers a Christian curriculum and there is no evidence detailing the actual meaning religion plays in its education.

¶ 22 The school accepts children of all denominations. Sortedahl testified that if he attempted to advance

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[5] Although the commission conceded that Soldiers is religious in nature, it did so in its conclusion that Peniel was not "operated, supervised, controlled, or principally supported by a church or a convention or association of churches." Section 108.02, STATS.

any particular creed or doctrine, "Jewish people would not send their children because [Peniel] would make Christians out of them." There is a conspicuous absence of any dedication to advancing a particular faith or religion. *Cf.* ***Nampa,*** 719 P.2d at 1178 (teachers were required to have beliefs consistent with the school's Statement of Faith, be heavily involved in local churches and integrate the school's religious position into the instruction in non-denominational school "organized by a group of parents interested in providing a 'Christian' education for high school students"). Peniel simply does not hold itself out as a school with a primary purpose of advancing religion.

¶ 23 Soldiers explicitly states that it does not challenge the commission's factual findings. We conclude that there was no other interpretation of § 108.02(15)(h)2, STATS., or application to the commission's factual findings that would be more reasonable than the commission's. Because the record shows that the school is not operated primarily for religious purposes, we need not decide whether the school is principally supported by any church or convention or association of churches. *See* ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of an appeal, the court will not decide other issues raised).

By the Court.–Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

STATE OF WISCONSIN CIRCUIT COURT
ST. CROIX COUNTY

SOLDIERS OF JESUS CHRIST, INC.,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF WORKFORCE DEVELOPMENT, KENNETH H. KUBE,

Defendants.

MEMORANDUM DECISION

Case No. 98 CV 187

INTRODUCTION

This is an unemployment compensation appeal. The plaintiff, Soldiers of Jesus Christ, Inc., seeks judicial review of the April 7, 1998, decision of the Labor and Industry Review Commission (LIRC), which determined that it is not exempt under §108.02(15)(h), Stats., and that its former employee, Kenneth H. Kube, is therefore eligible for unemployment compensation benefits.

FACTS

The following facts were made by the LIRC in its April 7th decision and are largely undisputed. From November 23, 1993 until August of 1994, Kube worked for the plaintiff and performed telemarketing, fundraising and construction work. *See* June 5, 1997, Transcript at p. 4. As payment for his services, Kube sometimes received checks drawn on the personal checking

account of the plaintiff's director and his wife, and sometimes checks were from Soldiers of Jesus Christ Peniel Christian Church. Transcript at p. 27.

The plaintiff's founder, director and pastor for 25 years has been Kenneth Sortedahl. Transcript at p. 9. Mr. Sortedahl described his organization as follows:

> [I]t's a Christian boarding school. We take in students that have got life control problems. Children that have been in trouble with the law and trouble in – trouble at their homes or in trouble in the community in general and they come and they stay for one year. We have a Christian school there. That's so they go right to our school right on the grounds. We have Christian service twice a day. We have devotions in the morning and evening after each meal and the children have a Christian curriculum, called Accelerated Christian Education curriculum. And it's like an ongoing bible camp is really what it is. And we really are able to help a lot of students and they – they turn out really well. In all the years we've had the home we've only had one boy ever go in the penitentiary and we got a lot of them out of jail. We've never had one go in a mental institution that I know of. We've never had one commit suicide that stayed the full year. We have a very effective program.

Transcript at pp. 9-10.

As testified to by Mr. Sortedahl and noted by the LIRC in its decision, there is no dispute that:

> The school consists of 150 acres with 3 houses, one for a school, one for a boy's dorm, and one for a girl's dorm. There are three trailer houses for staff. There is also a barn. At the time of the

> hearing the employer had 18 students and 7 people performing services for the school. The employer operates mainly on donations. It is supported by churches of all denominations. It does charge tuition but students are not required to pay a certain amount. It costs up to $1,000 per month, but not all the students pay that much.
>
> Christian services occur twice a day including devotions in the morning and evening. Christian services are conducted in the school itself. The employer holds Christian services in the meal area after the tables are cleared. The employer uses a "Christian" curriculum. Mr. Sortedahl is a Lutheran pastor but does not preach Lutheran doctrine. If he did that, Jewish people would not send their children because the employer would make Christians out of them. The employer just preaches the Bible in its services. The employer does not follow any doctrine nor does it criticize any doctrines. The employer considers the school to be "cross-denominational." It takes students of any denomination or no denomination. The employer has baptism services on the ground and is open to having visitors come to services.

See Record at pp. 5-6.

After his employment with the plaintiff was terminated, Kube filed a claim for unemployment compensation. The plaintiff objected on the grounds that it was exempt pursuant to §108.02(15)(h), Stats.

On April 25, 1995, a deputy of defendant LIRC issued an initial determination finding that Kube was not eligible for unemployment benefits based on the exempt status of the plaintiff. The deputy concluded that the plaintiff was an organization "operated primarily for religious purpose" and that it was specifically excluded from coverage under §108.02(15)(h). As a result, Kube's claim for unemployment compensation benefits was denied.

Kube appealed this determination and a hearing was held before Administrative Law Judge (ALJ) David C. Wagner on June 5, 1997. On June 27, 1997, the ALJ issued his decision, reversed the deputy's initial determination and found that Kube's employment with the plaintiff was not subject to the coverage exclusion of §108.02(15)(h). Specifically, the ALJ found that Kube:

> was not in the employ of a church or convention or association of churches as denoted in the above statutory citation. The school is not operated primarily for religious purposes, nor is it principally supported by a church, convention or association of churches.

See June 27, 1997, Appeal Tribunal Decision. Based on this decision, Kube was eligible for unemployment compensation benefits vis-á-vis his employment with the plaintiff.

The plaintiff appealed and on April 7, 1998, the LIRC issued a decision that modified the ALJ's decision by amplifying his findings, but ultimately affirmed the finding that Kube was eligible for unemployment compensation benefits as the plaintiff was not "operated primarily for religious purpose" and excluded from coverage under §108.02(15)(h). The LIRC specifically found that the plaintiff was not a church, was not an organization operated

primarily for religious purposes, and was not supported by a church or convention or association of churches within the meaning of §108.02(15)(h):

> From the evidence presented at the hearing [the plaintiff] is first and foremost a school. Again, there is a lack of testimony about the precise role of religion in the school's curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it difficult to find that the school operates **primarily** for religious purposes. In fact, it seems that primarily [sic] objective of the employer is keeping kids out of trouble while providing an education and room and board.

Record at p. 12. The plaintiff now seeks judicial review of that decision.

STATUTE INVOLVED

CHAPTER 108. UNEMPLOYMENT INSURANCE AND RESERVES

108.02. Definitions. As used in this chapter . . .

15 . . . (h) "employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:

1. In the employ of a church or convention or association of churches;

2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally

supported by a church or convention or association of churches; or

3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

STANDARD OF REVIEW

102.23. Judicial review

(1)(a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive.

. . .

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

ANALYSIS

A. Findings of Fact

Historically, the LIRC has been the ultimate finder of fact and law. *DILHR v. LIRC*, 161 Wis.2d 231, 244, 467 N.W.2d 545 (1991). It is the factual and legal findings of

the LIRC that are scrutinized by an appellate court and not those of the appeal tribunal. *Id.* at 242. A reviewing court's role is to search the record to locate credible evidence which supports the LIRC's determination. *Farmer's Mill of Athens, Inc. v. ILHR Dept.*, 97 Wis.2d 576, 579-80, 294 N.W.2d 39 (1980).

B. Does the Record Support the LIRC's Decision?

The LIRC's factual findings must be upheld by the Court if they are supported by substantial and credible evidence in the record. *Cornwell Personnel Assocs. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 795 (Ct. App. 1993). Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable factfinder could base a conclusion. *Id.*

In the present case, the Court is of the opinion that there is substantial evidence in the record that supports the LIRC's conclusion that the plaintiff is not "operated primarily for religious purpose" and is therefore not exempt under §108.02(15)(h). The record is replete with evidence that the plaintiff is operated primarily for the purpose providing limited-term assistance, including education, room and board, to children who have been in trouble with the law. Transcript at pp. 9-10.

In order to be exempt, the statute requires that the plaintiff either be a church, be operated primarily for religious purposes or be principally supported by a church or convention or association of churches. Here, the evidence presented supports the conclusion that, though there is certainly a religious component to the organization and purpose of the plaintiff, its primary

objective is to help troubled children and provide them, on a short-term basis, with an education, room and board. Record at pp. 5-6.

Though professing to be operated primarily for religious purposes, the plaintiff is unable to identify with any specificity the precise role of religion in its "Christian curriculum" and, in fact, undercuts its position elsewhere by referring to itself as "cross-denominational" and not supported by "any one certain denomination." Transcript at p. 16. As stated by Mr. Sortedahl, the plaintiff is not specifically affiliated with one specific denomination because it wishes to provide services to as many children in need as possible, regardless of their religion. Transcript at p. 16. Though clearly praiseworthy, such evidence undercuts the plaintiff's position that it is operated primarily for religious purposes.

Other evidence in the record that is relevant, credible, probative, and of a quantum upon which the LIRC could base its conclusion is that the plaintiff sought and received financial assistance from outside sources and was not principally supported by an identifiable church or association of churches. Transcript at p. 4, 11, 16. It is undisputed that the plaintiff operates mainly on donations, received from a variety of sources, and that Kube was engaged in fundraising and telemarketing in his job. Transcript at p. 4. Further undisputed is that Kube received checks drawn on both personal and organizational checking accounts during the course of his employment and that the students were charged tuition. Again, this evidence supports the LIRC's conclusion that the plaintiff is not an organization operated primarily for religious purposes within the meaning of §108.02(15)(h).

Based on its review, the Court finds ample support for that conclusion.

CONCLUSION

Given the deference that the Court must give to the factual findings made by the LIRC and given that those findings are supported by credible and substantial evidence, the decision of the LIRC is hereby affirmed.

BY THE COURT:

Dated this 12th day of February, 1999.

/s/ C.A. Richards
Honorable C.A. Richards
Circuit Court Judge
Branch II

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

KENNETH H KUBE,
Employe
881 OHIO ST RM B
ST PAUL MN 55118

PENIEL CHRISTIAN
SCHOOL, Employer
P O BOX 457
SPRING VALLEY WI
54767-0457

UNEMPLOYMENT
INSURANCE DECISION

Hearing No. 95002070MD
S. S. No. 476-40-1066

SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on the applicable law, records and evidence in this case, the commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employe worked from November 23, 1993 until August of 1994, at performing telemarketing, fundraising, and construction work, for the employer. Sometimes he received checks drawn on the personal checking account of the employer's director and his wife, and sometimes checks were from Soldiers for Jesus Christ Peniel Christian Church.

The employer's founder, director and pastor for 25 years has been Kenneth Sortedahl. Mr. Sortedahl described the employer as a Christian Boarding School. The employer was incorporated in 1971 in St. Croix County and goes by the name Soldiers of Jesus Christ.[1] The employer testified that its school's name is Peniel, but the mission and the school are under the Soldiers of Jesus Christ Corporation.

The school takes in students with life control problems, i.e. children who have been in trouble with the law, in their homes, and in their community. Students stay at the school for one year. The school consists of 150 acres with 3 houses, one for a school, one for a boy's [sic] dorm, and one for a girl's [sic] dorm. There are three trailer houses for staff. There is also a barn. At the time of the hearing the employer had 18 students and 7 people performing services for the school. The employer operates mainly on donations. It is supported by churches of all denominations. It does charge tuition but students are

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[1] During the hearing the employer was apparently shown a number of documents from its attorney and indicated that it was originally incorporated in 1971 as Soldiers of Jesus Christ and the recertification document dated March 30, 1995 was recorded by the St. Croix Register Of Deeds. Mr. Sortedahl apparently read the last paragraph of that document which stated: "the church and school are a nonprofit organization under Chapter 181 and intend to maintain the organization under the chapter as well as Chapter 187, make this filing to clarify the organization's status as both a church and a school, said articles are recorded on 12/23/91 and as amended and recorded on 12/31/92 are hereby incorporated by reference as attached herein." The document referred to was not admitted into the record.

not required to pay a certain amount. It costs up to $1,000 per month, but not all the students pay that much.

Christian services occur twice a day including devotions in the morning and evening. Christian services are conducted in the school itself. The employer holds Christian services in the meal area after the tables are cleared. The employer uses a "Christian" curriculum. Mr. Sortedahl is a Lutheran pastor but does not preach Lutheran doctrine. If he did that, Jewish people would not send their children because the employer would make Christians out of them. The employer just preaches the Bible in its services. The employer does not follow any doctrine nor does it criticize any doctrines. The employer considers the school to be "cross-denominational." It takes students of any denomination or no denomination. The employer has baptism services on the ground and is open to having visitors come to services.

According to Mr. Sortedahl the "IRS has always recognized us" as a legitimate Christian organization. However, a letter from the IRS to the employe dated October 17, 1994, states that the Soldiers of Jesus Christ, Inc., Peniel Christian School has not been recognized by the IRS as exempt. In addition, a letter dated November 2, 1994, from the State of Wisconsin to the employe states that Soldiers of Jesus Christ/Peniel Christian School is not registered as a charitable organization in the State of Wisconsin.

The issue to be decided is whether the employe's services for the employer were covered under the Wisconsin Unemployment Insurance Law. The employer

maintains that the services were not in covered employment because the employer is excluded under Wis. Stat. § 108.02(15)(h) which provides as follows:

> "(h) 'Employment' as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> "1. In the employ of a church or convention or association of churches;
>
> "2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches;"

The employer's argument is that it is not simply a Christian school, but it is a school and a church. The employer maintains that it was incorporated as both a church and school. However, accepting that the employer incorporated as both a church and school, the mere fact of incorporation does not establish that it is in fact a church for unemployment insurance purposes.[2]

Neither Wisconsin statutes nor FUTA defines church. A number of courts have been faced with determining

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[2] The commission does agree with the employer that the church exclusion is not dependent upon the existence of a physical "house of worship." ***St. Martin Evangelical Lutheran Church et al v. South Dakota,*** 451 U.S. 772 (1981).

whether an organization is a church for state unemployment tax purposes. Courts have relied on the IRS's 14 criteria to determine whether an organization is a church. Those 14 criteria are:

(1) a distinct legal existence

(2) a recognized creed and form of worship

(3) a definite and distinct ecclesiastical government

(4) a formal code of doctrine and discipline

(5) a distinct religious history

(6) a membership not associated with any other church or denomination

(7) an organization of ordained ministers

(8) ordained ministers selected after completing prescribed studies

(9) a literature of its own

(10) established places of worship

(11) regular congregations

(12) regular religious services

(13) Sunday schools for religious instruction of the young

(14) schools for the preparation of its ministers.

The IRS's criteria was used by the court in **Nampa *Christian Schools Foundation, Inc. v. State of Idaho,*** 110 Idaho 918, 719 P.2d 1178 (1986). In ***Nampa,*** the claimant worked as an office worker for Nampa Christian until laid off. She then filed for unemployment insurance. The

State statute involved is virtually identical to the Wisconsin statute involved in this case. The appeals examiner ultimately found that she was entitled to unemployment insurance. The Industrial Commission reversed holding that the State statute which dealt with exemptions from coverage violated the Establishment Clause of the First Amendment to the United States Constitution.

Nampa was a school organized by a group of parents interested in providing a "Christian" education for high school students. The school was in the hands of a board of trustees elected by corporation members. Corporation members had to be parents of former or current students and had to be in good standing of a local church or of a fellowship that did not recognize membership. Corporation members had to believe in Jesus Christ, have a personal relationship with him, and agree with the schools Statement of Faith.[3] Teachers were required to have beliefs consistent with the Statement of Faith, to integrate the Statement of Faith into their teaching, and to attend regular faculty prayer meetings. The churches whose members attended as students did not direct the schools operation, nor did any group of churches band

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[3] The Statement of Faith consists of thirteen statements of belief (1) in the Holy Scriptures, (2) in the one triune God, (3) in the Lord Jesus Christ, (4) in the Holy Spirit, (5) in the creation and fall of man, (6) in salvation by grace through faith, (7) in righteous living and good work, (8) in the existence of Satan, (9) in the second coming of Christ, (10) in future life, bodily resurrection and eternal judgment, (11) in one true Church, (12) in separation from the world, and (13) in educating young people according to the foregoing principles and teaching in a non-denominational manner.

together to control or supervise the school. The school was nondenominational and parents of children attending the school had to agree to stay nondenominational and not inject any doctrinal controversy into the school.[4]

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[4] The court went on to describe the school:

"Religious ideological practices permeate Nampa Christian's affairs. The school's articles of incorporation state the purposes of the school as follows: (1) to instruct in all subjects 'on the basis of the Biblical philosophy of creation, history and destination'; (2) 'to teach the Bible, Biblical and historical theology, the science of Christian education, the history and methods of missions, and other related subjects'; (3) 'to educate persons through [its] schools and, as the opportunity may arise, through additional course work, Bible Institute and Seminary training as may be appropriate.' Ex. No. 19, p. 1.

Students who attend Nampa Christian agree to 'revere God and His established authority.' Ex. No. 29, p. 6. Students are also told that 'Christian conduct' is expected of them. Id. Most students in grades 7-12 sign the school's Statement of Faith. Ex. No. 30, p. 14.

No subject taught at Nampa Christian is regarded as 'secular.' Ex. No. 23, pp. 1-2. Students attend chapel services weekly, and Bible study is required of all junior high and high school students. In short, as the Industrial Commission noted, '[r]eligion pervades every aspect of the educational program of Nampa Christian Schools, Inc.' R., Vol. 2, p. 13. The Commission also stated that, although Nampa consistent with the beliefs of a number of churches in the Treasure Valley area, and Nampa Christian could not exist as a private school without the moral support of those several churches.' R., Vol. 2, p. 14 (emphasis added).

Eighty-five percent of the school's financial support comes from tuition paid by students, and 15 percent

The court applied the 14 IRS factors stating:

"The purpose behind Nampa Christian is not so much to declare a specific body of doctrine, as it is to provide students with a religious education that supports the body of doctrine with which a wide number of fundamentalist churches can agree. Thus, the fourth factor weighs against Nampa Christian being a 'church.'

"We likewise find no evidence of a definite ecclesiastical government nor a membership unassociated with other churches [factors three and six]. In fact, participation in Nampa Christian is predicated in part upon an individual's membership in and contribution to a church of his or her choice. While worship does occur, and regularly, it is clear that it is done with the intent of strengthening the students and helping them to prepare for service on behalf of their communities and the 'Risen Saviour.' Ex. No. 19. n6.

"The school does not use 'ordained ministers' [factors seven and eight]. A tenet of the School's Statement of Faith, in fact, is that the school remain nondenominational. See footnote 1, supra. Considering the factors mentioned above, we are convinced that Nampa Christian is not a church for purposes of I.C. § 72-1316A(g)(1)(i)."

Nampa at 922-923.

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comes from donations and other sources. Only a small amount of financial support comes from individual churches. In fact, less than one percent of the financial support comes from the churches themselves."

Nampa, at 919.

The court then turned to the question of whether Nampa was operated primarily for religious purposes and principally supported by an association of churches. As with "church" what constituted a "convention or association of churches" had not been previously defined. The court adopted definition of "The act of associating, or the state of being associated; fellowship; combination for a common purpose." The court further indicated that the term applies to "a cooperative undertaking by churches of differing denominations." The court concluded that "the several different churches which are united by their relationship to Nampa Christian constitute an 'association of churches.' " ***Nampa*** at 923.

The court further found that Nampa was an organization primarily for religious purposes as it operated for religious purposes and "the school's intent and operations reveals that it is a school with a religious mission and purpose." ***Nampa*** at 923. Finally, the court found that while there was no evidence that Nampa was operated, supervised, or controlled by the various churches which had members attending the school, the school was principally supported by the group of churches. The court further stated:

> "The statutory language . . . does not require a church's or group of churches' support to be financial in order for that to be recognizable under the statute. The statute merely states "support." While a contribution of money is strong indicia of one's support, it cannot be held, statutorily, to be the only way in which to support an organization. There is no logical reason to differentiate between the types of support an organization may receive. Likewise, there is

> no statutory command to do so. The key is the quality of the support by a church or group of churches in order for it to qualify for the tax exception. Such is the case here.
>
> "The commission made the finding of fact that Nampa Christian could not exist as a private school without the moral support of those several churches. . . . We hold that this type of support constitutes "principal" support – if the school "could not exist" without the churches' support, it is dependent upon that support. Such dependency constitutes "principal" support for purposes of [the statute].
>
> "Our holding today is not broad. It does not mean that mere moral support offered by a church or group of churches to an organization operated for religious purposes will qualify that organization for tax exemption status. . . . Rather, our decision states that before tax exemption status can be granted, the Commission must find as fact that such support is necessary for the religious organizations continued operation. . . . "

Nampa, at 924.

In ***MHS, Inc.***, UC Hearing No. 8852 (LIRC, July 12, 1991), the commission determined that a nonprofit corporation that operated a formerly Catholic high school met the exclusion contained in Wis. Stat. § 108.02(15)(h)2. In doing so, the commission found unpersuasive the ***Nampa*** court's holding that "a Christian school that got 'moral support' but no financial help from a convention or association of churches fell within [the exclusion]." The commission noted that the "moral support" appeared to have been limited to allowing the school to recruit church

members for students. The commission nonetheless found that the exclusion applied stating:

> "However, the influence of the Catholic church in this case far exceeds allowing the appellant to recruit for students from the Catholic Archdiocese of Milwaukee. The Catholic church establishes the doctrine and theology under which the school is operated, thereby exercising control. Moreover, should the Catholic church withdraw its tacit approval of Messmer High School as a 'Catholic high school', the effect would no doubt be substantial. Messmer High School's principal testified that the Capuchin order would not allow him to serve as principal if the school were not a 'Catholic high school.' The Catholic church's approval may thus be viewed as a form of support and control. The Catholic church also provides supervision, control and support through staff and board members who are not only practicing Catholics, but in some instances members of ecclesiastical orders that are part of the Catholic church. The appellant exists to preserve and advance Catholic tradition and the Catholic doctrine. Under the circumstances, the appellant is, to an extent sufficient to satisfy sec. 108.02(15)(h)2, Stats., controlled, operated, supervised *or* principally supported by the Catholic church."

MHS, at 3.

The commission finds that the employer is not a church. Looking at the IRS's criteria, and recognizing that it is not a question of how many are satisfied, the employer completely meets very few of 14 criteria. Certainly, the evidence presented by the employer doesn't establish that (2) through (9) and (13) and (14) have been

met. The employer's attempt to accommodate various religions and be "cross-denominational" doesn't preclude it from being able to meet such criterion as a recognized creed. At least the interdenominational Nampa had its Statement of Faith. As demonstrated by the commission's recitation of the facts in ***Nampa,*** the lack of evidence in this case of the role of religion in the employer's existence, let alone its school, is striking. The evidence in ***Nampa*** was used to show how religion permeated almost every aspect of the school. In ***Nampa*** there was quite extensive evidence about how pervasive religion was in the actual instruction. There is a definite lack of such evidence in this case. The commission simply does not know what constitutes a "Christian" curriculum. The lunchroom may count as an established place of worship and the students and presumably the teachers met twice a day (10 through 12). How open these meetings were to the general public or whether anyone outside of the students and teachers regularly attended such services is not indicated in the record. The only testimony is that the employer is "open to having visitors come to our services" not that visitors do or how they are aware of such services. Simply because the employer holds religious services does not make the employer a church. Clearly, the employe does not work for a convention or association of churches.

The next question is whether the employer is an organization operated primarily for religious purposes. The commission finds that it is not. From the evidence presented at the hearing it is first and foremost a school. Again, there is a lack of testimony about the precise role

of religion in the school's curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it difficult to find that the school operates **primarily** for religious purposes. In fact, it seems the primarily [sic] objective of the employer is keeping kids out of trouble while providing an education and room and board.

Even if the commission were to find that the employer operated primarily for religious purposes it would find that it is not "operated, supervised, controlled, or principally supported by a church or a convention or association of churches." Clearly the employer is not operated, supervised or controlled by a particular church or a convention or association of churches. Rather, the question is whether it is "principally supported by a . . . convention or association of churches." In ***Nampa*** the court found "moral" support by other churches sufficient. However, the commission in ***MHS*** found the type of moral support exhibited in ***Nampa*** to be less than persuasive in satisfying the exclusion. Indeed, reviewing the "support" demonstrated by the Catholic church in ***MHS***, it was rather extensive. Here, again, there is really no evidence of any particular church or group or association of churches that has lent support, moral or otherwise, to the employer. Mr. Sortedahl did testify that the employer operates mainly on donations and is supported by churches of all denominations. However, again, the employer does not receive funds from a *particular* church nor a *particular* association of or grouping of churches. The exclusion does not apply if an organization is primarily supported by "churches," but by a "convention" or

"association" of churches. The commission does not dispute that the employer is religious in nature, but being religious in nature does not satisfy the unemployment insurance exclusion at issue here.

The commission therefore finds that the employer is not a church, it is not operated primarily for religious purposes, and is not supported by a church or convention or association of churches within the meaning of Wis. Stat. § 108.02(15)(h).

DECISION

The decision of the administrative law judge is modified and, as modified, is affirmed. Accordingly, the employe is eligible for benefits based on his services with the employer, if he is otherwise qualified.

Dated and mailed

APR 07 1998
kubeken:132:1 ET 483

/s/ David B. Falstad
David B. Falstad,
Chairman

/s/ Pamela I. Anderson
Pamela I. Anderson,
Commissioner

/s/ James A. Rutkowski
James A. Rutkowski,
Commissioner

MEMORANDUM OPINION

The employer's petition contains a number of factual assertions and documentation that were not made or submitted at the hearing. The commission's rules provide that review by the commission is on the record of the case including the synopsis or summary of the testimony or other evidence presented at the hearing. Chapter LIRC 1.04 Wis. Admin. Code. The law requires that the commission's review be based solely on the testimony and documents presented at the hearing before the administrative law judge. Therefore, the commission cannot consider factual assertions made in the petition, or documents submitted with the petition, which were not also made or submitted at the hearing. Since the commission's review must therefore be based on the evidence submitted at the hearing which has already been held, the commission will not address or consider the factual assertions made by the employe which are not supported by the record. The commission has considered the arguments raised by the employer but finds then unpersuasive.

cc: ATTORNEY HUGH H GWIN
GWIN & WERTHEIMER SC
P O BOX 106
HUDSON WI 54016

APPEAL TRIBUNAL DECISION

1801 Aberg Ave., Ste. A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

State of Wisconsin
Department of Workforce Development
Unemployment Insurance

Mailed to:

FILE COPY

Hearing No. 95002070MD

In the matter of:

Employee:
KENNETH H KUBE, APPELLANT

L.O. & S.S. No.: 27/476-40-1066

vs.

Employer:
PENIEL CHRISTIAN SCHOOL,
RESPONDENT

UI Account No.: 613286

APPEAL RIGHTS

THIS DECISION WILL BECOME FINAL UNLESS A WRITTEN APPEAL IS FILED WITHIN 21 DAYS FROM THE DATE OF THIS DECISION. (SEE DATE BELOW.) THE APPEAL MAY BE FILED AT A UI HEARING OFFICE OR THE LABOR AND INDUSTRY REVIEW COMMISSION OFFICE. THE COMMISSION WILL REVIEW THE EVIDENCE ALREADY PRESENTED AT THE HEARING TO MAKE A DECISION. NO FURTHER

HEARING WILL BE HELD UNLESS THE COMMISSION SO ORDERS.

A CLAIMANT WHO IS STILL UNEMPLOYED SHOULD CONTINUE TO FILE CLAIMS WHILE THE REVIEW IS PENDING. IF THIS DECISION ALLOWS BENEFIT PAYMENT, PAYMENTS WILL BE MADE AND WILL CONTINUE UNLESS A LATER DECISION DENIES BENEFIT PAYMENT. IF THIS DECISION OR ANY HIGHER LEVEL DECISION REVERSES AND RESULTS IN A DENIAL OF BENEFIT PAYMENT, THE CLAIMANT WILL BE REQUIRED TO REPAY PREVIOUSLY PAID BENEFITS.

ANOTHER HEARING WILL NOT BE SCHEDULED UNLESS A PARTY WHO FAILED TO APPEAR SHOWS GOOD CAUSE FOR NOT APPEARING AT THE HEARING ORIGINALLY SCHEDULED. THE REQUEST FOR RESCHEDULING MUST BE IN WRITING, MUST EXPLAIN THE REASON FOR FAILING TO APPEAR, AND SHOULD BE MAILED IMMEDIATELY TO THE VI HEARING OFFICE ABOVE. IF YOU DO NOT UNDERSTAND THE PROCEDURE, CALL THE UI HEARING OFFICE FOR ASSISTANCE.

DECISION: SEE ATTACHED DECISION WHICH REVERSES THE INITIAL DETERMINATION.

Employe appeared by:
IN PERSON

Employer appeared by:
HUGH H GWIN
ATTORNEY

Administrative Law Judge

DAVID C. WAGNER

Dated and Mailed

JUNE 27, 1997

Appeal Must be Received or Postmarked by:

JULY 18, 1997

(SEE REVERSE FOR ADDITIONAL INFORMATION)

Decision Mailed to:
KENNETH H KUBE, 881 OHIO ST RM B, SAINT PAUL, MN 55118
PENIEL CHRISTIAN SCHOOL, SOLDIERS OF JESUS CHRIST, P O BOX 457, SPRING VALLEY, WI 54767-0457
ATTORNEY HUGH H GWIN, 430 SECOND ST., HUDSON, WI 54016

THE DEPARTMENT'S INITIAL DETERMINATION HELD: that the claimant's services for the employer were not covered under the Wisconsin unemployment compensation law because the claimant worked for an organization operated primarily for religious purposes. As a result, benefits were denied.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant performed services as a fund raiser for the employer, a school. He last performed services in August of 1994.

The issue to be decided is whether the claimant's services for the employer were covered under the Wisconsin unemployment compensation law.

The claimant worked for the employer as a fund raiser and that employment ended when he had problems receiving payment for his services. He maintained that his services should not have been excluded because the employer's operation was not operated primarily for religious purposes.

Section 108.02(15)(h) of the statutes provides as follows:

> (h) "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> 1. In the employ of a church or convention or association of churches;
>
> 2. In the employe [sic] of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches; of
>
> 3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a **religious order** in the exercise of duties required by such order.

The employer's operation operates as a school. It accepts troubled children who receive schooling, room and board. The school is operated by an ordained Lutheran minister. Although nondenominational services are held, there is no church located on the premises, nor

are any services of any denomination conducted on the premises, as youth of all denominations are accepted at the school. Those students whose parents can afford tuition pay for the schooling, and other students costs are defrayed through donations.

The claimant was not in the employ of a church or convention or association of churches as denoted in the above statutory citation. The school is not operated primarily for religious purposes, nor is it principally supported by a church, convention or association of churches. Although a duly ordained minister oversees the operation of the school, it is not in the exercise of his ministry. Although religion plays a part in the school's attempt to straighten out the lives of troubled youth, it cannot be held that any of the above statutory conditions existed during the term of service provided by the claimant.

The appeal tribunal therefore finds that the claimant's services for the employer were not excluded services within the meaning of section 108.02(15)(h) of the statutes.

DECISION

The department's initial determination is reversed. Accordingly, the claimant is eligible for benefits based upon his services with the employer, if otherwise qualified.

APPEAL TRIBUNAL

by /s/ David C. Wagner
David C. Wagner
Administrative Law Judge

FAX: 608-267-1377

COMBINED WAGE CLAIMS
P. O. BOX 7965
201 E. WASHINGTON 476-40-1066
MADISON, WI 53707-7

INITIAL DETERMINATION

KENNETH H KUBE
881 OHIO ST RM B
SAINT PAUL MN 55118

RECEIVED
APR 2, 1995
MADISON HEARING OFFICE

41/94
10/08/94 108.02(13)

THE EMPLOYER IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 108.

THE CLAIMANT PERFORMED SERVICES FOR A CORPORATION KNOWN AS "SOLDIERS OF JESUS CHRIST, INC." AN ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES. SUCH SERVICES ARE EXCLUDED FROM COVERAGE UNDER SECTION 108.02(15)(h) OF THE WISCONSIN STATUTES.

EFFECT

NO BENEFITS CAN BE PAID BASED ON WORK PERFORMED FOR THIS EMPLOYER.

AS A RESULT OF THIS DETERMINATION. NO WAGES ARE AVAILABLE FOR TRANSFER UNDER THE "INTERSTATE ARRANGEMENT TO COMBINE EMPLOYMENT AND WAGES".

WARREN GORDON 04/25/95 05/09/95

UCB-20
Unemployment Compensation Office

COMBINED WAGE CLAIMS
P.O. BOX 7965
201 E. WASHINGTON
MADISON, WI 53707-7

State of Wisconsin EM100 KI
Department of Industry, Labor and Human Relations Unemployment Compensation Division

FAX: 608-267-1377

SS # 476-40-1066 UC Acct. #

UNKNOWN HEARING OFFICE COPY

DUPLICATE
INITIAL DETERMINATION

KENNETH H KUBE
881 OHIO ST RM B
SAINT PAUL MN 55118

Issue Week: 41/94

Week Ending: 10/08/94

Wisconsin Statutes: 108.02(13)

FINDINGS AND DETERMINATION OF THE DEPUTY:

THE EMPLOYER IS NOT SUBJECT TO THE PROVISIONS OF CHAPTER 108.

THE CLAIMANT PERFORMED SERVICES FOR A CORPORATION KNOWN AS "SOLDIERS OF JESUS CHRIST, INC," AN ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES. SUCH SERVICES ARE EXCLUDED FROM COVERAGE UNDER SECTION 108.02(15)(h) OF THE WISCONSIN STATUTES.

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AS A RESULT OF THIS DETERMINATION, NO WAGES ARE AVAILABLE FOR TRANSFER UNDER THE "INTERSTATE ARRANGEMENT TO COMBINE EMPLOYMENT AND WAGES".

THIS APPEAL FILED 05/02/95

DEPUTY
WARREN GORDON

DATE MAILED
04/25/95

DECISION FINAL UNLESS APPEAL FILED OR POSTMARKED BY: 05/09/95

UCB-20 (R. 10/90)
SEE REVERSE SIDE FOR APPEAL INFORMATION

REPORT ON EMPLOYER STATUS FOR BENEFIT CLAIM
TO: Combined Wage U.C. LOCAL OFFICE DATE: 3/21/95

In reply to your request for information, our records indicate (see checked item(s) below):

EMPLOYER:

Peniel Christian School

CLAIMANT:

Kenneth H. Kube
476-40-1066

[ ] EMPLOYER'S U.C. ACCOUNT NUMBER IS _____.

[ ] EMPLOYER HAS NO U.C. ACCOUNT NUMBER. NOT SUBJECT.

[ ] NO $1,500.00 OR 1 IN 20. NOT SUBJECT.

[X] EXCLUDED EMPLOYMENT:
- [ ] AG EXCLUSION 108.02(15)(k)(1)
- [ ] DOMESTIC EXCLUSION 108.02(15)(k)(2)
- [ ] FAMILY EXCLUSION 108.02(15)(k)(11)
- [X] RELIGIOUS EXCLUSION 108.02(15)(h)
- [ ] DIRECT SELLER EXCLUSION 108.02(15)(k)(16)
- [ ] OTHER _____

[ ] EMPLOYER IS NON PROFIT. NOT SUBJECT.

[ ] EMPLOYER HAS REPORTED THIS EMPLOYE'S WAGES TO THE STATE OF _____ FILE AN IB CLAIM.

[ ] EMPLOYER HAS ELECTED TO COVER THIS MULTISTATE EMPLOYE UNDER THE _____ U.C. LAW. FILE AN IB CLAIM.

[ ] EMPLOYER OUT OF BUSINESS _____. NEW OWNER REPORTED TO BE _____

[ ] WILL RECHECK EMPLOYER'S STATUS AFTER _____

[ ] OTHER.

WISCONSIN
MAR 24 1995
I.B. UNIT

NSW entered 3/22/95 BF

/s/ Shirley Bernhardt
EMPLOYER COVERAGE UNIT

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 99-0846

SOLDIERS OF JESUS CHRIST, INC.,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF WORKFORCE DEVELOPMENT and KENNETH H. KUBE,

Defendants-Respondents.

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

MILLER & MILLER
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By Steven L. Miller #01005582
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River Falls, WI 54022
(715) 425-9780

On appeal from the Labor and Industry Review Commission and the Circuit Court of St. Croix County, C.A. Richards, Circuit Judge, presiding.

* * *

ISSUES FOR REVIEW

1. Is the "Peniel Christian School" a "church" pursuant to Wis. Stat. § 108.02(15)(h) and thus exempt from unemployment compensation requirements?

The Labor and Industry Review Commission Answered: "No."

The Trial Court Answered: "No." The trial court affirmed the LIRC's factual and legal determinations finding they were supported by the evidence.

2. Alternatively, is the "Peniel Christian School" a [sic] an organization operated "primarily for religious purposes" and "operated, supervised, controlled, or principally supported by a church or convention or association of churches" pursuant to Wis. Stat. § 108.02(15)(h) and thus exempt from unemployment compensation requirements?

The Labor and Industry Review Commission Answered: "No."

The Trial Court Answered: "No." The trial court affirmed the LIRC's factual and legal determinations finding they were supported by the evidence.

* * *

As the facts are undisputed[7], the issues presented are ones of first impression, and there are, as well, first amendment overtones, this Court should decide these issues *de novo*.

---

[7] Peniel is not contesting any factual finding. The only possible exception is whether Peniel is registered as exempt by the IRS or the State of Wisconsin. The Commission points to a letter from the Chicago Office of the IRS and the State of Wisconsin stating the employer has not been recognized as an exempt organization. See footnote 5, *infra*.

II. THE PENIAL [sic] CHRISTIAN SCHOOL IS A "CHURCH" WITHIN THE BROAD DEFINITION OF THE TERM.

The Commission conceded neither Wisconsin Statutes nor "FUTA" defines the term "church." The Commission then chose to adopt the IRS's "14 criteria."[8] Applying those criteria, it found Peniel "completely meets very few of the 14 criteria." In particular, "the evidence presented by the employer doesn't establish that (2) through (9) and (13) and (14) have been met." The Commission further found the "lack of evidence in this case of the role of religion in the employer's existence, let alone its school, is striking" as the "commission simply does not know what constitutes a 'Christian' curriculum." (R 3:LIRC Record p. 11). Finally, the Commission opines that holding religious services does not make the employer a church. The Commission concedes, however, the church exclusion is not dependent upon the existence

---

[8] (1) A distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline' (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of ministers. *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P.2d 1178, 1182 (1986).

of a physical "house of worship," citing *St. Martin Evangelical Lutheran Church et al v. South Dakota,* 451 U.S. 772 (1981).

What constitutes a "church" for the purposes of Wis. Stat. § 108.02(15)(h) is a question of first impression in Wisconsin. This Court should define religious exemptions liberally in order to avoid "entanglement" with first amendment concerns. See *In re: Hollis Hills Jewish Center,* 461 N.Y.2d 555, 556, 92 A.D.2d 1039, 1039-1040 (1983); *In re: Klein,* 563 N.Y.2d 132, ___, 164 A.D.2d 9, 11 (1990); *Verdecchia v. Unemployment Compensation Board of Review,* 657 A.2d 1341, 1345 (1995); *Czigler v. Administrator, Ohio Bureau of Employment Services, et al,* 501 N.E.2d 56, 59 (1985). The common dictionary definition of "church" is broad, and includes: "a body or organization of religious believers"; "the whole body of Christians"; "a public divine worship"; and "a building for public esp. Christian worship." (Webster's New Collegiate Dictionary, 1977). Indeed, a liberal approach is consistent with the policy of the LIRC in determining initial exemption, which is to accept, for the most part, a non-profit institution's self-description as a "church". (R 3:Transcript p.33). Indeed, the LIRC's own employee initially determined Peniel to be an exempt religious organization. Having heard the evidence presented at the hearing, her assessment remained the same. (R 3:LIRC Record p. 20; Transcript p.33-34).

The Commission concedes Penial [sic] "is religious in nature" and Pastor Sortedahl's "primary personal motives . . . are no doubt Christian in nature." (R 3:LIRC Record p. 12; 5:11). That concession, along with a record showing religious activity (twice daily Christian services;

baptisms; communion; visiting pastors, etc.); a religious orientation and philosophy, including a "Christian" based curriculum; a full-time ordained Lutheran minister who preaches "the Bible"; and legal incorporation as a church as well as a school; more than meets the definition of "church" for the purposes of Wis. Stat. § 108.02(15)(h)1. (R 3: LIRC Record p. 16, 20-21; Transcript p. 10-12, 15, 17, 18, 19-21, 36-38).

The 14 IRS criteria relied upon by the Commission have never been accepted by a Wisconsin Appellate Court. They should not be applied here because they are not helpful. They don't fit a non-denominational "Christian" institution such a [sic] Peniel, especially when they are literally applied. They will not be met no matter how "religious" the institution might be.

Unless, of course, one views Peniel and similar institutions as part of the "Christian Church" in the larger sense. Then many of the criteria do apply. For example, when compared in a general sense to other major religious faiths such as Islam and Buddism (which also have a multitude of sects and doctrinal variations), "Christianity" has a recognized creed and form of worship; a formal code of doctrine and discipline; a distinct religious history; ordained ministers; a literature of its own; and schools for the preparation of ministers; thus meeting criteria (2), (4), (5), (7), (8), (9), (14). Peniel, in particular, has a distinct legal existence; a membership not directly associated with any particular church or denomination; an establish [sic] place of worship; regular congregations (the students and staff); regular religious services; and, quite clearly, a school for religious instruction of the "young;" thus meeting criteria (1), (6), (10), (11), (12) (13).

In short, depending on how liberally or broadly one applies the criteria, they can be easily met in this case.

III. ALTERNATIVELY, THE PENIEL CHRISTIAN SCHOOL IS OPERATED "PRIMARILY FOR RELIGIOUS PURPOSES" AND IS "PRINCIPALLY SUPPORTED BY A[N] ASSOCIATION OF CHURCHES."

The Commission found Peniel was not an organization operated primarily for religious purposes:

> From the evidence presented at the hearing it is first and foremost a school. Again, there is a lack of testimony about the precise role of religion in the school curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it difficult to find that the school operates ***primarily*** for religious purposes. In fact, it seems the primarily (sic) objective of the employer is keeping kids out of trouble while providing an education and room and board.

(Emphasis original) (R 3:LIRC Record p. 12).

The Commission's decision is both legally and factually indefensible.

The Commission conceded Peniel "is religious in nature." (R 3:LIRC Record p.12) The Commission conceded in its brief to the circuit court that Pastor Sortedahl's "primary personal motives . . . are no doubt Christian in nature." (R 5:11) Nevertheless, the Commission argues personal motives are irrelevant and, in any event, "[t]here can only be one 'primary purpose' for an organization, and here that "primary purpose" was "one

of reclaiming troubled children" rather than "fostering or promoting a religious purpose." (R 5:9).

The Commission's position is contrary to the case law. Peniel need not show that religion "pervades" the operation of the school in order to show it is operated "primarily" for religious purposes. "Primarily" means " 'of first importance.' 'principally,' 'essentially,' or 'fundamentally' as opposed to 'secondarily' or 'merely incidental.' " *Department of Employment v. Champion Bake-N-Serve, Inc.*, 100 Idaho 53, 592 P2d 1370, 1372 (1979), citing *Malat v. Riddell*, 383 U.S. 569 (1966). In addition, "primarily" does not mean proportional:

> 'Primarily' is an adverb and, as the word implies, it modifies the word "operated." It has no purpose or implication in this sentence as to the relative proportion of subject matter of a religious nature that must be provided. . . . The exemption statute simply requires that the purpose of the organization and its operation or support be primarily religiously oriented in the conduct of its activity. This exemption statute does not require or suggest the weighing of hours of secular and religious instruction or other activity.
>
> The exemption is determined by the purpose of the existence and operation of the school. If that purpose be primarily of a religious nature, the exemption applies without regard to the proportion of time devoted to religious instruction.

Czigler v. Administrator, Ohio Bureau of Employment Services et al, 501 N.E.2d 56, 57 (1985). See also e.g. *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of*

Employment, 110 Idaho 918, 719 P.2d 1178, 1183 (& fn 7) (1986) (Nondenominational Christian high school operated "primarily for religious purpose" even though primary goal may have been educational); *In re: Hollis Hills Jewish Center*, 461 N.Y.2d 555, 92 A.D.2d 1039, 1039-1040 (1983) (Nursery school teachers at nursery run by nonprofit religious organization exempt from state unemployment compensation laws as "person[s] employed at a place of worship . . . for the performance of duties of a religious nature. . . . "); *Department of Employment v. Champion Bake-N-Serve, Inc.*, 592 P.2d at 1371-1372 (1979) (Students employed in bakery as part of Seventh Day Adventists high school curriculum was "primarily for religious purposes.")

In addition, a "religious purpose" clause should be liberally construed to favor exemption. See *Hollis Hills*, 461 N.Y.2d at 556. cf. *In re: Klein*, 164 A.D.2d 9, 11, 563 N.Y.2d 132 (1990) (Characterization by employer that its operation of school was related to religious objectives, made in good faith, must be accepted by civil courts.) See also *Verdecchia v. Unemployment Compensation Board of Review*, 657 A.2d 1341, 1345 (1995) (Statutory language "operated primarily for religious purposes" creates imprecise standard. While normally exemptions would be strictly construed against the employer the rule is superceded in instances where there is a strong possibility the statute may infringe upon a party's right to free exercise of religion.) *Czigler*, 501 N.E.2d at 59 (Courts should apply liberal construction of "religious purposes" to avoid potentially serious entanglements with Establishment clause of the First Amendment.)

The Commission's concession the Peniel Christian School "is religious in nature" is enough to meet the "religious purpose" standard. (R 3:LIRC Record p.12) In addition, the undisputed evidence Peniel held twice-a-day religious services; "preached the Bible;" used the "Accelerated Christian Education curriculum;" conducted baptismal services and weekly communion services; used "visiting pastors" to lead devotions; relied almost exclusively on volunteers; was self-described as a "Christian School" under the corporate name of "Soldiers of Jesus Christ, Inc."; and was founded and lead [sic] by an ordained Lutheran minister; all underscores the religious mission of the organization and the school. While the primary goal of the school may have been, as the Commission found, to keep "kids out of trouble while providing an education and room and board," the motive for doing so and the distinctive means by which it was done is religious in nature. The first half of the test is clearly met.

The Commission also denied exemption under the second part of the statute because "there is really no evidence of any particular church or group or association of churches that has lent support, moral or otherwise, to the employer." (R 3:LIRC Record p. 12). The Commission's decision is, again, neither factually nor legally correct.

The Commission's decision contrasts sharply with the Idaho Supreme Court's holding in *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P.2d 1178, 1182 (1986), a case cited at length by the Commission itself in support of its "church" and "religious purpose" argument. In

Nampa, the issue, among others, was whether a corporate, nondenominational "Christian" high school was "principally supported by an association of churches." There was no formal associative body and the support was not financial, as 85% of the school's revenues came from tuition. *Id.* at 1179. Instead, the school relied upon the "moral" support of various local churches. *Id.* at 1179, 1184. The court held the exemption was met.

The Idaho court began by acknowledging "no definition of the term 'convention or association of churches' exists. . . . " (*Id.* at 1183). The court then adopted a "broader" definition, that being:

> The act of associating, or the state of being associated; fellowship; combination for a common purpose,. . . . Thus . . . the term applies to a 'cooperative undertaking by churches of differing denominations',. . . .

Id. The (Idaho) department nevertheless objected arguing that "principal" support had to include financial support. The Court disagreed:

> The statutory language of [Idaho's equivalent to Wis. Stat. § 108.02(15)(h)2] does not require a church's or groups of churches' support to be financial in order for that to be recognizable under the statute. The statute merely states "support." While a contribution of money is a strong indicia of one's support, it cannot be held, statutorily, to be the only way to support an organization.

Id. at 1184. The question is ultimately one of dependency. If the school is dependent upon the churches' support –

whether moral, financial or otherwise – it is "principally" supported for the purposes of the statute. *Id.*

In short, a [sic] "a church or convention or association of churches" requires only common "support" of the school purpose by one or more churches. It does not require a formal relationship. "Principally supported" means only a dependency on that support, whether it be moral, financial or otherwise.

The evidence that Peniel met the exemption is even stronger than it was in *Nampa*. Here the mission is supported almost entirely by donations (85%) rather than tuition (15%). Pastor Sortedahl stated the mission receives "support" from "churches of all denominations." (R 3:Transcript p.16) "[D]ifferent pastors" come and lead services. (R 3:Transcript p.15). Churches also assist in the fund raising[9]. (R 3:LIRC Record 18; Transcript p.27) Finally, Pastor Sortedahl is an ordained Lutheran minister whose full-time ministry is the school and mission. (R 3:Transcript p.18).

The "support" from "churches of all denominations" alone meets the Nampa test. This is particularly true when that support is likely financial – given the heavy dependence on donations – in addition to moral support for the mission's objectives. It also includes donated services by "visiting" pastors. It includes the use of church facilities for fund raising. The Commissions' complaint that there was no evidence of a "particular church" of "particular association of churches" has no legal basis

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[9] Defendant testified he made fund raising telephone calls from "another church." Transcript p.27.

and is clearly rejected in *Nampa*. Indeed, the churches in *Nampa* were only identified as "local churches" and "a number of churches in the Treasure Valley area." *Id.* at 1179. The *Nampa* churches were no more "particular" than the churches identified by Pastor Sortedahl.

Alternatively, one could argue plaintiff was supported by a "church" because of Pastor Sortedahl's status as an ordained Lutheran minister. (R 3:LIRC Record p. 55). The school and mission are Pastor Sortedahl's full-time ministry. (R 3: Transcript p.18) By permitting Pastor Sortedahl to engage in this "mission" as an ordained minister of the Church, the "Lutheran Church," if one defines "church" in the larger sense, could be said to principally support plaintiff's mission and school. Indeed, without Pastor Sortedahl and the blessing of the Lutheran Church, the school would likely cease to be.

* * *

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 3

Case No. 99-0846
Trial Court Case No. 98-CV-187
Case Classification Code No. 30607

SOLDIERS OF JESUS CHRIST, INC.,
Plaintiff-Appellant,

vs.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF WORKFORCE DEVELOPMENT and KENNETH H. KUBE,

Defendants-Respondents.

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR ST. CROIX COUNTY
HONORABLE C.A. RICHARDS,
CIRCUIT JUDGE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT LABOR AND INDUSTRY REVIEW COMMISSION

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June 16, 1999

* * *

TABLE OF OTHER AUTHORITY

MHS, Inc., U.C. Hearing No. 8852, S (LIRC, July 12, 1991) 15

U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 39-78 .....27, 29

Supplement No. 5 of Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566 29

STATEMENT OF ISSUES

Does credible and substantial evidence support defendant-respondent Labor and Industry Review Commission's (hereinafter commission) finding that defendant-respondent Kenneth H. Kube's (hereinafter employe) employment with plaintiff-appellant Soldiers of Jesus Christ, Inc. (hereinafter employer) was not employment excluded from coverage for unemployment compensation purposes, within the meaning of Wis. Stat. § 108.02(15)(h), and that the employe was therefore eligible to claim unemployment compensation benefits based on that employment?

The Circuit Court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT

There is nothing in this dispute which cannot be clearly and thoroughly argued by the parties in their briefs, and the commission believes oral argument would merely result in restatement of those arguments presented in the briefs. Accordingly, the commission opposes oral argument because it believes it would be an unnecessary drain on valuable time and resource.

* * *

II. THE RECORD SUPPORTS THE COMMISSION'S DETERMINATION THAT THE EMPLOYER'S SCHOOL IS NOT A "CHURCH" UNDER WIS. STAT. § 108.02(15)(h)l.

The employer argues that its school is "church" for purposes of Wis. Stat. § 108.02(15)(h)1. This argument is based on the following testimony from the employer's founder and director, Kenneth Sortedahl:

(1) . . . we just preach the bible (T.16)

(2) . . . the children have a Christian curriculum, called Accelerated Christian Education curriculum (T.10)

(3) . . . We have Christian service twice a day (T.9)

(4) . . . We've had baptisms. . . . right on the grounds (T.14)

(5) . . . we just have communion there, each Monday morning but we don't get into any kind of doctrine as far as the millennial reign and all of that goes (T.17)

(6) . . . I'm a Lutheran pastor, but I don't preach Lutheran doctrine. . . . then the Jewish people wouldn't send their children because they would say well, they're going [to] make Christians out of them (T.16).

(7) That the church and school as organized and is organized as a church and school is a nonprofit organization under Chapter 181 and intends to maintain the organization under that chapter as well as Chapter 187, makes this filing to clarify the organization status as both a church and a school. Said articles as recorded on December 23, 1971, and as amended and recorded on December 31, 1992, are hereby incorporated by reference as attached herein (T.36-37).

Mr. Sortedahl also testified:

> Well, it's a Christian boarding school. We take in students that have got life control problems. Children that have been in trouble with the law and trouble in – trouble at their home or in trouble in the community in general and they come and they stay for one year. We have a Christian school there. That's so they go right to our school right on the grounds. We have Christian service twice a day. We have devotions in the morning and evening after each meal and the children have a Christian curriculum, called Accelerated Christian Education curriculum. And it's like an ongoing bible camp is really what it is. And we really are able to help a lot of students and they – they turn out really well (T.9-10).

By any reasonable criteria, this evidence does not describe a church. Such was the finding of the commission (R.7), affirmed by the circuit court in the following, concise holding:

> Here, the evidence presented supports the conclusion that, though there is certainly a religious component to the organization and purpose of the plaintiff, its primary objective is to help troubled children and provide them, on a short-term basis, with an education, room and board. (7:6).

The commission and the circuit court noted that Mr. Sortedahl's description of his school as a church was fundamentally inconsistent with his testimony that "we're cross-denominational" and "we do not take up with any one certain denomination . . . " (T.16). In addition, Mr. Sortedahl's references to a "Christian curriculum" and religious services without "get[ing] into any kind of doctrine" (T.10,17) do not describe any specific religion or religious structure.

The employer takes issue with the commission's factual reliance on the 14 criteria which the IRS uses to determine whether an organization is a church (R.7), and on the fact that the employer's school does not clearly satisfy any of those criteria except for having a distinct legal existence.[5] But given the lack of a statutory definition of "church" in Chapter 108 of Wisconsin Statutes, the

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[5] The commission accepted the fact that Soldiers of Jesus Christ, Inc. has a distinct legal existence by virtue of Mr. Sortedahl's testimony that he incorporated that entity as a self-denoted "church and school" with the State of Wisconsin. However, as the commission found in its decision, the mere fact

IRS criteria constitute a reasonable aid in making this determination. These criteria were relied upon in ***Nampa Christian Schools Foundation, Inc. v. State of Idaho, Department of Employment,*** 110 Idaho 918, 719 P.2d 1178 (1986). ***Nampa*** is cited by the employer on pages 13 and 15 through 17 of its brief.[6] Perhaps of greatest importance, the 14 criteria established by the IRS are nothing more than the elements a reasonable person would expect a church organization to possess.

In ***St. Martin Evangelical Lutheran Church, et al v. South Dakota,*** 451 U.S. 772; 101 S. Ct.2142 (1981), it was held that an elementary Christian day school and a four-year secondary school, neither of which was a separate legal entity from the Wisconsin Evangelical Lutheran Synod, each came within the coverage exception of "church" under 26 U.S.C. 3309(b)(l)(A).[7] The court based its decision substantially on the fact that the schools were not separate legal entities from the Synod. ***Id.*** at 784. Unfortunately for our purposes, the Court was not concerned with detailing the legal characteristics of a "church," because it was conceded that the Synod constituted a church. The employer cannot realistically attempt to compare itself with a religious organization such as the

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of such incorporation did not establish that the employer was in fact a church for unemployment compensation purposes (R.7).

[6] The ***Nampa*** court found that the Christian high school at issue therein, which had a good deal more indicia of a religious organization than the employer's school, was not a "church" under a statute virtually identical to Wis. Stat. § 108.02(15)(h)1.

[7] This is the statute from which Wis. Stat. § 108.02(15)(h)1. originates, as explained later in this brief.

Wisconsin Evangelical Lutheran Synod, which would certainly satisfy all 14 of the IRS criteria. In this context, the employer's arguments that Mr. Sortedahl acted as a full-time Lutheran minister for its school, with the "blessing" of the Lutheran Church, should be addressed.[8]

On pages 17-18 of the hearing transcript Mr. Sortedahl recounts his career as a Lutheran minister. He describes how he left a Lutheran church pastorship in order to found and operate the Peniel School. There is *no evidence* in the record that any element of the Lutheran Church authorized, encouraged, or otherwise "blessed" Mr. Sortedahl's decision to found or operate this school. Of course, the commission recognizes that the work Mr. Sortedahl does at the school, and the efforts he has put into its creation and operation are extremely laudable. But the question at hand is not one concerning Mr. Sortedahl's or his school's moral stature. It is simply a question of whether an individual working for the school is entitled to unemployment compensation coverage. To that purpose, it must also be recognized that there is *no evidence* in the record that the Peniel School has any affiliation, formal or informal, with any branch of the Lutheran Church. As previously noted, Mr. Sortedahl emphasized that the school's approach to religious activities is strictly non-denominational. Mr. Sortedahl acknowledged that he does not preach Lutheran doctrine at the school, so to attempt to characterize his work there as a Lutheran ministry is simply not realistic.

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[8] See pages 11, 16-17 of the employer's brief.

The employer's brief points to Mr. Sortedahl's testimony that the school receives moral and financial support from "churches of all denominations" (T.18), but this vague testimony does not give the fact finder any detail concerning what organizations or individuals provide support. Numerous non-religious charitable organizations could claim they receive support from churches of all denominations. We do know that the school charges tuition on a pay-as-you-can basis (T.11), that there are "donations" and "volunteers" (id.), that the employe (Kenneth Kube) sometimes received his pay from the school's account and sometimes from the Sortedahls' personal checking account (T.27), and that Mr. Kube's duties included telemarketing and fund raising activities for the employer. Obviously, the employer's school receives its operating funds from tuition and from whatever charitable resources and impulses it can locate. The employer's assertion that the Lutheran Church supports its school morally or financially is not supported by the record.

As the commission explained in its decision (R.10-11), it has previously found unpersuasive the *Nampa* court's holding that "a Christian school that got 'moral support' but no financial help from a convention or association of churches fell within the exclusion."[9] This quote is from a previous commission decision: *MHS, Inc.*, U.C. Hearing No. 8852, S (LIRC, July 12, 1991)[10]. In the employer's case, there is not even evidence of moral

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[9] See ***Nampa Christian Schools Foundation, Inc. v. State of Idaho, Department of Employment,*** 110 Idaho at 924.

[10] Attached to this brief as Appendix A.

support from any particular church organization. Furthermore, it is for Wisconsin to construe its own unemployment compensation act to meet its purpose and intent, rather than to rely on the constructions other states have made of their acts. ***Bernhardt v. LIRC,*** 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App. 1996); ***Moorman Manufacturing Company v. Industrial Comm.,*** 241 Wis. 200, 207, 5 N.W.2d 743 (1942). The fundamental objective of Wisconsin's Unemployment Compensation Act is to mitigate economic loss to the unemployed worker and his/her family. ***Milwaukee Transformer Company v. Industrial Comm.,*** 22 Wis. 2d 502, 511, 126 N.W.2d 6 (1964); ***Moorman Manufacturing Co. v. Industrial Comm.,*** 241 Wis. at 204-05.

III. THE RECORD SUPPORTS THE COMMISSION'S FINDING THAT THE EMPLOYER'S SCHOOL WAS NOT OPERATED PRIMARILY FOR RELIGIOUS PURPOSES AND OPERATED, SUPERVISED, CONTROLLED, OR PRINCIPALLY SUPPORTED BY A CHURCH OR CONVENTION OR ASSOCIATION OF CHURCHES, PURSUANT TO WIS. STAT. § 108.02(15)(h)2.

Most of the arguments the commission has just made concerning the issue of whether the employer's school is a "church" under Wis. Stat. § 108.02(15)(h)1., are equally applicable to the issue of whether the employer's school is operated primarily for religious purposes, and operated, supervised, controlled, or principally supported by a church or convention or association of churches under Wis. Stat. § 108.02(15)(h)2. The employer is a private, independently operated creation of Mr. Sortedahl and his

wife. It is not principally supported by any particular religious entity or association, it is cross-denominational, and does not constitute a Lutheran or other religious ministry. The employer's arguments concerning the school's religious characteristics and mission cannot disguise the fact that its primary purpose is the laudatory goal of educating and rehabilitating troubled youngsters at a boarding school, not promoting a religious purpose.

Mr. Sortedahl testified that he preached the Bible, but he did not explain what aspects of the Bible he preached. The Bible says many different things to many different people, and contains a wealth of good common sense which would not necessarily involve a religious purpose. The record does not explain how often the Bible is preached, or what an "Accelerated Christian Curriculum" involves. Nor does it explain what transpires during the employer's cross-denominational services, which are apparently acceptable to members of the Jewish faith as well as to those of no denomination (T.16). We are not told whether students are required to attend any particular service, or under what doctrine or religious authority Mr. Sortedahl distributes "communion" each Monday morning (T.17). Mr. Sortedahl's insistence that "we don't get into any kind of doctrine" leaves the fact finder guessing as to what he does get into from the standpoint of a recognizable religious purpose. A parent reviewing the record of this case would know that the employer's facility would provide a sheltered boarding school environment for one year for his/her troubled child, but that same parent could have no illusions that he/she would be sending the child to a school with a primarily religious purpose.

Mr. Sortedahl apparently interjects anecdotal elements of Christianity into the school's curriculum, to some undefined extent, but there is not a primary purpose to teach a Christian or other religion. Drawing the distinction between schools with or without such primary religious purpose involves precisely the type of factual, value, and policy determinations which the commission is legislatively and judicially mandated to perform. ***Bunker v. LIRC,*** 197 Wis. 2d 611-12. It is the commission's business to weigh the evidence and determine the values and purpose of a particular school. From a policy standpoint, it would be inappropriate to grant exclusion from unemployment compensation coverage to every school which merely claims affinity with the Christian faith. Wis. Stat. § 108.02(15)(h)2. is, by its unambiguous terms, designed to exclude from coverage organizations operated primarily for religious purposes. It is not designed to exclude from coverage schools operated for a beneficent but primarily non-religious purpose, which may be administered by men and women who are personally religious.

In attempting to find out-of-state support for its arguments, the employer cites three cases. In ***In the matter of Hollis Hills Jewish Center,*** 461 N.W.2d 555, 92 A.D.2d 1039 (1983), which held that teachers in a nursery school " . . . operated in accordance with the mandates of the Jewish religion and emphasiz[ing] the beliefs and principles of that faith" were employed at "a place of worship . . . for the performance of duties of a religious nature." ***Id.*** at 556. The differences between this Jewish nursery school and the employer's school are too obvious to belabor.

Department of Employment v. Champion Bake-N-Serve, Inc., 100 Idaho 53, 592 P.2d 1370 (1979), is another non-analogous citation by the employer. That case involved a high school owned and operated by a corporation solely composed of Seventh Day Adventists, who required students to take 40 credit hours of Seventh Day Adventist religious instruction in addition to a secular high school curriculum, as well as to perform labor in a bakery (or other location) as a part of their religious training. *Id.* at 54. The primary purpose of the bakery was to provide students with work experience as part of their religious training. *Id.* If the bakery did not turn a profit the Seventh Day Adventist's corporation absorbed the loss. *Id.* The court held the bakery was operated primarily for a religious purpose; namely, it provided a method for satisfying a required tenet of religious training for these Seventh Day Adventist students. No religious tenets were established or satisfied at the employer's boarding school.

Finally, *Verdecchia v. Unemployment Compensation Board of Review*, 657 A.2d 1341 (1995), a Commonwealth Court of Pennsylvania case, involved unemployment compensation claimants who had worked at St. Joseph's Personal Care Residence, a Roman Catholic establishment which ministered to poor and elderly individuals. *Id.* at 1343. St. Joseph's was not a separately incorporated legal entity, but was under the direct control of the Roman Catholic Diocese. *Id.* at 1346. The court held that the Diocese operated St. Joseph's as part of its ministry to the poor, and primarily for a religious purpose. *Id.* Again, we see the "primarily religious purpose" label applied to a defined, and in these cases well established, religious

organization which sponsors, controls, and directs the institution at issue for a straightforward religious purpose. The employer's school simply does not come close to matching the factual circumstances of these cases.

Since the employer has cited out-of-state decisions in this matter, the commission would point to a case in which the facts were more analogous to those in our case. In ***Pittsburgh Leadership Foundation v. Unemployment Compensation Board of Review,*** 654 A.2d 224 (1995), also a Commonwealth Court of Pennsylvania case, the Foundation was described as a "Christian-based organization" organized as a nonprofit corporation, which provided counseling for troubled youth, prisoners, addicts, and victims of abuse. ***Id.*** at 225. The court affirmed the Board of Review's finding of unemployment compensation coverage stating:

> "Further, it is not this Court's function to usurp the Board's role as fact-finder when the Board's determination is supported by substantial evidence, as in this case, that petitioner's primary function and activities cannot be deemed those of a religious organization, exempt from the requirements the Law imposes upon employers." ***Id.*** at 226.

IV. THE COMMISSION'S DECISION DOES NOT INFRINGE THE EMPLOYER'S FIRST AMENDMENT RIGHTS.

The employer also asserts Wis. Stat. § 108.02(15)(h) should be interpreted liberally in order to avoid potentially serious entanglements with the Establishment clause of the First Amendment. The employer fails to

articulate what concerns it sees,[11] but merely cites to four out-of-state decisions which addressed the First Amendment question in varying contexts. In ***Verdecchia v. Unemployment Compensation Board of Review,*** 657 A.2d at 1345, the court cautioned that imposition of unemployment compensation tax liability on a Roman Catholic Diocese for its operation of an institution ministering to the poor raised the "strong possibility" of constitutional infringement upon free exercise of religion. We have previously seen how dissimilar the employer's school was from the institution at issue in ***Verdecchia***.

In ***Czigler v. Administrator, Ohio Bureau of Employment Services,*** 27 Ohio App.3d 272; 501 N.E.2d 56 (1985), a private, Jewish elementary and high school, "primarily designed for religious purposes,"[12] was excluded from unemployment compensation tax coverage. In so holding, the court addressed arguments raised concerning "First Amendment entanglements" by agreeing that a liberal interpretation of a "religious purpose" statute was in keeping with avoidance of such entanglements. ***Id.*** at 59.

In ***In the Matter of Hollis Hills Jewish Center,*** 461 N.Y.2d at 556, the court merely stated:

> "Moreover, the religious aspects of church-operated schools have recently been acknowledged by our State's highest court (citation omitted).

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[11] Courts are not disposed to decide the validity of constitutional claims broadly stated but not specifically argued. ***State v. Scherreiks,*** 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989).

[12] ***Id.*** at 58.

In ***In the Matter of Shirley Klein v. Harnett, Commissioner of Labor,*** 563 N.Y.S.2d 132, 164 A.D.2d 9 (1990), the claimant, a teacher, was denied unemployment compensation on the basis that a Jewish high school was not covered employment. ***Id.*** at 133. The *claimant* argued that the school's *exclusion* from coverage violated the First Amendment. ***Id.*** The court stated:

> "We find that a reading of the statute at issue here 'affords no basis for a conclusion that the legislative intent was to advance religion' . . . Although one effect of the statute permits religious organizations an exemption from paying contributions for unemployment benefits, any religious benefit is, again, incidental . . . Instead, the statute's primary effect is, in our view, the efficient administration of the Labor Law attained in part by maintaining the concept of the state's 'benevolent neutrality' toward all religion . . . Finally, we discern no 'excessive entanglement' between the statute and religious establishments." ***Id.*** at 134.

In referring to the First Amendment, the employer attempts to substitute a constitutional argument for its failure to introduce facts which could establish the existence of a church, religion, or primarily religious purpose at its school. Had the employer presented credible and substantial evidence supporting its position, the commission would not have hesitated to have found that employment with it was excluded under Wis. Stat. 108.02 (15)(h). Not to so find would have been contrary to the

statute, and probably[13] also in contravention of the First Amendment. However, as the commission has previously detailed in this brief, credible evidence of the existence of a church or a religion is not in the record, unless the definition of "church" is broadened well beyond the limits of reason. There could be no First Amendment problem in this case because there was no church or religion involved in it.

V. THE COMMISSION'S APPLICATION OF WIS. STAT. § 108.02(15)(h) IS CONSISTENT WITH THE PURPOSE AND INTENT OF THE FUTA STATUTE AFTER WHICH IT IS PATTERNED, A RESULT WHICH IS ALSO CONSISTENT WITH THE WISCONSIN LEGISLATURE'S INTENT.

Wis. Stat. § 108.02(15)(h) has its origin in the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 et seq.

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[13] The Wisconsin Supreme Court stated in *Jackson v. Benson*, 218 Wis. 2d 835, 874, 578 N.W.2d 602 (1998):

> "Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lanow*, 403 U.S. at 614. Some relationship between the State and religious organizations is inevitable. See *Id.* (citing *Zorrack*, 343 U.S. at 312). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." See *Agostini 117 S.Ct. at 2015.*"

FUTA provides substantial tax credits to employers in states which conform their state unemployment compensation laws to FUTA, and for this purpose the language as well as the intent of Wis. Stat. § 108.02(15)(h) has always mirrored that of the federal statute, 26 U.S.C. 3309(b). The history of the federal statute is set forth in U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 39-78 (attached as Appendix B to this brief). That history is relevant to the correct interpretation of Wis. Stat. § 108.02(15)(h).[14]

Effective January 1, 1972, 26 U.S.C 3309(b) was created to provide specific exclusions to unemployment insurance coverage, which at that time was otherwise broadened to include coverage for most nonprofit organizations. The 1972 statute included a coverage exclusion for elementary and secondary schools. Effective January 1, 1978, the statute was amended to eliminate the coverage exclusion for elementary and secondary schools. Several different church groups challenged the repeal of this coverage exclusion, but their challenge was rejected by the U. S. Department of Labor (see UIPL 39-78).[15] On

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[14] Publications of the U. S. Department of Labor, which interprets and administers FUTA, are relevant in interpreting the legislative intent of Wisconsin's Unemployment Compensation Statutes. ***DILHR v. LIRC***, 161 Wis. 2d 231, 247-48, 467 N.W.2d 545 (1991).

The history of 26 U.S.C. 3309(b) is also set forth in ***St. Martin Evangelical Lutheran Church, et al v. South Dakota***, 451 U.S. at 774-78.

[15] Additional explanation of the U. S. Department of Labor's reasoning in rejecting the bid to retain the coverage exclusion for church-related elementary and secondary schools

pages 2-3 of UIPL 39-78, the U. S. Department of Labor stated:

> The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA, (and aside from the permitted (b)(2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b)(1)(B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b)(1)(B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

Nothing could be clearer concerning the purpose and intent of the federal and Wisconsin statutes, particularly as it relates to the case at hand. The U. S. Department of Labor's explanation shows that the exclusion from unemployment compensation coverage for churches and church operated schools is to be narrowly construed in

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is found in Supplement No. 5 of Draft Language and Commentary to implement the Unemployment Compensation Amendments of 1976-P. L. 94-566, attached as Appendix C to this brief.

keeping with the social purpose of the unemployment compensation program. Employes of schools such as the employer's, which are not affiliated with any particular religious doctrine or organization, but are primarily engaged in non-religious educational activities, cannot be excluded from unemployment compensation eligibility.

CONCLUSION

The credible evidence of record fails to demonstrate that the employer's school, established and operated primarily to shelter and rehabilitate children with a history of trouble with the law, constituted a church, or an organization operated primarily for religious purposes and operated or principally supported by a church or convention or association of churches.

The record demonstrates that there is no credible evidence that the employer's school contained the basic elements constituting a church, but that it functioned to assist troubled children in overcoming their secular difficulties. The school did not adhere to a defined religious creed or doctrine, had no form of ecclesiastical government, no established places of worship, no religious training of ministers or clergy, no religious history, and no defined or recognized form of worship.

The record does demonstrate that the employer's director introduced poorly-defined elements of the Christian faith, unaligned with any religious doctrine or authority, into the school's curriculum on an anecdotal basis. While the director's actions and intentions were certainly laudable, his school has been shown to have had a primarily rehabilitative rather than religious purpose.

Just as clearly, the record reveals that while the employer's school solicited and accepted donations from whatever source it could obtain them, it was not principally supported by any church or convention or association of churches.

The employer's argument that the statute at issue should be "liberally construed" in order to avoid entanglement with First Amendment concerns is poorly developed, and constitutes nothing more than an attempt to circumvent the facts of record. The court need not address undeveloped constitutional arguments. Regardless, First Amendment cautions are not relevant to this case in which the facts demonstrate that no reasonable person could construe the employer's school to be a church or religion.

The statute at issue is modeled after an identical statute found in the Federal Unemployment Tax Act, and the Wisconsin Unemployment Compensation Act conforms itself to FUTA in order to retain substantial federal tax credits for Wisconsin employers. Publications by the U. S. Department of Labor reveal that the coverage exclusion found in Wis. Stat. § 108.02(15)(h) was not intended for facilities such as the employer's school.

The commission's interpretation of the statute at issue was thoroughly intertwined with factual, value, and policy determinations, and is therefore entitled to great weight. This standard of review requires the court to affirm the commission's decision if it is reasonable, even if the court were to feel that an alternative interpretation would be more reasonable. The commission's decision

appropriately balances the fundamental purpose of Wisconsin's Unemployment Compensation Act with the purpose of Wis. Stat. § 108.02(15)(h), and is the most reasonable application of that statute to the facts presented.

Therefore, it is respectfully urged that the commission's decision in all respects be confirmed.

Respectfully submitted,

/s/ William W. Cassel
William W. Cassel
Attorney for Defendant-Respondent
LABOR AND INDUSTRY
REVIEW COMMISSION
State Bar No. 1005826

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June 16, 1999

* * *

APPENDIX

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BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the contribution liability, or status, under Chapter 108, Stats., of MHS, INC., Appllant [sic] Messmer High School c/o William Desing 742 West Capitol Drive Milwaukee, WI 53206 Account No. 306768-0	Hearing No. 8852, S SEE ENCLOSURE AS TO TIME LIMIT ON FURTHER APPEAL.

On December 11, 1989, the Department of Industry, Labor and Human Relations (the Department) issued an Initial Determination and Assessment of Employer's Contribution Liability (Initial Determination) which computed the appellant's liability based on employment from the third quarter of 1986 through the third quarter of 1989. The appellant filed a timely request for hearing and a hearing was held before an Appeal Tribunal on May 2, 1990. The Appeal Tribunal issued a decision on August 2, 1990, which found that the services upon which liability for unemployment compensation contributions was based constituted work for a non-profit organization in the employ of a church. As a result, the Appeal Tribunal Decision reversed the Initial Determination and found

that the appellant was not liable for unemployment compensation contributions. The Department filed a timely petition for Commission review.

Based on the applicable law, records, and evidence in this case, and after consultation with the Appeal Tribunal, the Commission make [sic] the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appellant is a nonprofit corporation that has operated Messmer High School since 1983. The school is located in a building at 742 West Capitol Drive in Milwaukee. Prior to the incorporation of the appellant in 1983, a school known as Messmer High School was operating in the same building. At that time, the building was owned by the Catholic Archdiocese of Milwaukee. Although the record is not entirely clear on the issue, the Archdiocese operated and controlled Messmer High School until 1983.

In 1983, the Archdiocese decided to close Messmer High School, apparently for financial reasons. Alumni, parents of Messmer High School students, and interested parties formed the appellant and persuaded the DeRance Foundation, a charity in Milwaukee, to purchase the building at 742 West Capitol Drive. After the DeRance Foundation purchased the building from the Archdiocese, it leased it to the appellant, rent free. The appellant then continued to operate the school, financed principally by tuition, contributions and grants from alumni, local businesses and charities. It also receives donated services from local religious orders.

The appellant and its board of directors operate and control Messmer High School. The Archdiocese no longer operates the school or controls its budget. However, priests from the Archdiocese do provide liturgical services to the school. The Archdiocese at least tacitly approves of the school's operations; indeed, the Archdiocese allows the appellant to recruit students from its parishes.

Messmer High School's stated mission is "eduction in the Catholic tradition." The current principal is a Capuchin priest. Two other Catholic ecclesiastical orders, the Dominicans and the Notre Dame nuns, are involved in the operation of the school. The high school conducts regular religious services and requires students to attend weekly prayer sessions. According to the principal, courses in Catholic theology are required of all students. Membership on the appellant's board of directors is limited to Catholics, which the Commission considers to mean practicing Roman Catholics belonging to the Catholic church.

The appellant contends that it is not liable for unemployment compensation contributions because the services its employes provide are excluded from the definition of employment under sec. 108.02 (15)(h), Stats. That statute provides, in part:

> 108.02 (15)(h) "Employment" as applied to work for a nonprofit organization, except as such organization duly elects otherwise with the department's approval, does not include service:
>
> 1. In the employ of a church or convention or association of churches;

2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

3. By a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.

The issue is whether the appellant, MHS, Inc., meets one of the alternative exceptions set out in sec. 108.02 (15)(h), Stats. The Appeal Tribunal concluded that the appellant meets the first exception. However, because the Commission finds that the second subdivision applies, it shall not consider the first subdivision or the issue of whether the appellant is a "church or convention or association of churches."

In order to fit the exception under sec. 108.02 (15)(h)2, Stats., the appellant must be an organization operated primarily for religious purposes *and* operated, supervised, controlled, or principally supported by a church or convention or association of churches. Messmer High School's mission, "education in the Catholic tradition", implicates both an educational and a religious purpose. While perhaps a major function of Messmer High School is educational, the reason it is operated is primarily to provide a Catholic religious influence on high school education. The emphasis on "Catholic tradition" makes the high school different from other public schools and many other private schools. Thus, while it is possible to characterize Messmer High School as an educational

institution, the primary reason for the institution is to continue the "Catholic tradition." Therefore, the Commission concludes Messmer High School is operated for a religious purpose.[1] Because the appellant was organized to operate Messmer High School, the appellant too is operated primarily for religious purposes.

The next issue is whether the appellant is operated, supervised or controlled or principally supported by a church or convention or association of churches. The Commission notes first that in sec. 108.02 (15)(h)2, Stats., the adverb "principally" modifies the word "supported" only, implying that the second prong of that statutory subdivision could be met if a church or convention or association of churches provides less than principal operation, supervision, or control over the appellant. The Commission also notes that the factors in the second prong are written in the disjunctive, so not all of them need be met for the second prong to apply.

The testimony of the witnesses at the hearing indicates that they believe the appellant is not controlled by the Catholic Archdiocese of Milwaukee. The Commission tends to agree that the appellant is free from the direct financial control of the Archdiocese. However, independence from the financial control of the Archdiocese does

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[1] Courts in other jurisdictions consistently reach the some [sic] conclusion in cases involving schools or hospitals with a religious orientation that are incorporated separately from a church. See *Nampa Christian Schools Foundation v. State*, 110 Idaho 918, 719 P.2d 1178, 1183 (1986); *Kendall v. Director of Division of Employment Security*, 393 Mass. 731, 473 N.E.2d 196 (1985) and *St. Vincent Infirmary Medical Center v. Director of Labor*, 32 Ark. App. 71, 797 S.W.2d 460, 464 (Ark. App., 1990).

not bar operation, supervision, control or support from the Catholic church itself. The Catholic church is an entity larger than the Archdiocese and the Commission does not read sec. 108.02 (15)(h)2, Stats., to be limited to the type of financial or hierarchical support the Archdiocese provided to Messmer High School before the incorporation of the appellant. Indeed, that statute seems to recognize that an excluded employing unit may be an organization separate from the church or convention or association of churches that operates, supervises, controls or principally supports it.

The Commission has considered *Nampa Christian School Foundation v. State*, 110 Idaho 918, 719 P.2d 1178 (1986), a case cited but distinguished by the Department. The Idaho Supreme Court in that case held that a Christian school that got "moral support" but no financial help from a convention or association of churches fell within the Idaho equivalent of sec. 108.02 (15)(h)2, Stats. The "moral support" seemed to be limited to allowing the school to recruit church members for students. The Commission agrees that that case is not particularly persuasive.

However, the influence of the Catholic church in this case far exceeds allowing the appellant to recruit for students from the Catholic Archdiocese of Milwaukee. The Catholic church establishes the doctrine and theology under which the school is operated, thereby exercising control. Moreover, should the Catholic church withdraw its tacit approval of Messmer High School as a "Catholic high school", the effect would no doubt be substantial. Messmer High School's principal testified that the Capuchin order would not allow him to serve as principal

if the school were not a "Catholic high school." The Catholic church's approval may thus be viewed as a form of support and control. The Catholic church also provides supervision, control and support through staff and board members who are not only practicing Catholics, but in some instances members of ecclesiastical orders that are part of the Catholic church. The appellant exists to preserve and advance Catholic tradition and the Catholic doctrine. Under the circumstances, the appellant is, to an extent sufficient to satisfy sec. 108.02 (15)(h)2, Stats., controlled, operated, supervised *or* principally supported by the Catholic church.

The Commission therefore finds that the services provided to the appellant constitute work for a non-profit organization operated primarily for religious purposes and operated, supervised, controlled or principally supported by a church or convention or association of churches within the meaning of sec. 108.02 (15)(h)2, Stats.

DECISION

The decision of the Appeal Tribunal is modified to conform to the foregoing and, as modified, is affirmed. Accordingly, the appellant is not liable for contributions, interest or penalties based on payroll for periods including the third quarter of 1986 through the third quarter of 1989.

Dated and mailed

July 12, 1991
101:CD3333
ET 483

/s/ Kevin C. Potter
Kevin C. Potter, Chairman

/s/
Carl W. Thompson, Commissioner

/s/ Pamela I. Anderson
Pamela I. Anderson,
Commissioner

cc: Enforcements Section
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U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

CLASSIFICATION UI

CORRESPONDENCE SYMBOL TURL

DATE May 30, 1978

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 39-78

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: /s/ Lawrence W. Rogers JSO See 227-78
6/5/78
Administrator
Field Operations

SUBJECT: Unemployment Insurance Coverage of Employees of Church-Related Nonprofit Elementary and Secondary Schools

1. *Purpose.* To inform SESAs of the following Secretary of Labor's decision concerning unemployment insurance coverage of employees of church-related nonprofit elementary and secondary schools: By repealing the former exclusion in section 3309(b)(3) of the Federal Unemployment Tax Act (FUTA) relating to services for education institutions, Congress clearly intended to extend coverage to services for church-related schools.

2. *References.* Sections 3304(a)(6) and 3309(a) and (b), FUTA, as enacted by Public Law 91-373 and amended by Public Law 94-566.

3. *Background.* In 1970, Congress extended unemployment insurance coverage to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State UI laws cover these services effective January 1, 1972, as a condition for Federal certification of the State law for tax credit (Public Law 91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in section 3309(b), PUTA, performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of

his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education."

The 1976 amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage, effective January 1, 1978, to most State and local government workers. Although retaining the limited exclusions under paragraphs (1) and (2) above, the Congress deleted the exclusion under paragraph (3) relating to elementary and secondary schools. The question posed was whether their exclusion is permitted pursuant to paragraph (1); paragraph (2) is not at issue.

Several different church groups challenged coverage of a variety of church-related elementary and secondary schools resulting from the repeal of the exemption contained in paragraph (3) basing their position on the alleged applicability of paragraph (1).

4. *Secretary's Decision.* Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools was announced April 18, 1978, in a letter of that date to the Most Reverend Thomas C. Kelley, O.P., General Secretary, United States Catholic Conference. Secretary Marshall advised that repeal by Congress of the exclusion in section 3309(b)(3), FUTA, formerly exempting employees of a school which is not an institution of higher education, was clearly intended to result in State coverage of church-related elementary and secondary schools.

The only services performed in church-related elementary and secondary schools recognized as being within

the scope of the exclusion permitted by section 3309(b)(1), FUTA, (and aside from the permitted (b)(2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b)(1), (B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b)(1)(B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

These conclusions, which are neutral as between schools operated by religious or secular organizations, given effect to the congressional purpose of extending unemployment insurance protection to virtually all employees. Thus, practically all of the estimated 242,000 employees of non-public elementary and secondary schools are covered; approximately 85 percent of the 242,000 are employees of church-related schools. Further, these conclusions are consistent with the well-established legal doctrine that exemptions from remedial statutes are to be narrowly construed and their application limited to those establishments plainly and unmistakably within their terms and spirit.

If an employee performs both non-exempt and exempt services during a single employment period, as in the

case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in section 3306(d), FUTA.

5. *Action Required.* All SESA's, except Kentucky for which coverage is deferred by Federal law until January 1, 1979, should inform all nonprofit elementary and secondary schools that services performed in their employ on and after January 1, 1978, are covered, with the limited exceptions specified above. All such employing units which are nonprofit institutions required to be covered should also be advised of their right to elect either the reimbursement or the contribution method of financing benefit costs. The election should be effective January 1, 1978.

Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 – P.L. 94-566

[Logo]

U.S. Department of Labor
Employment and Training Administration
Unemployment Insurance Service

Supplement #5, 1976 Draft Legislation

November 13, 1978

Definitions-service for nonprofit organization, section 2(k)(1)(C)
Refer: Commentary, page 25

1. *Question*:

Have any official issuances other than UIPL No. 39-78 and the Secretary's decision of April 18, 1978, been prepared by the Department concerning the coverage of employees of church-related schools?

Answer:

Yes. The office of the Solicitor in its letter of August 7, 1978 to Mr. Orin G. Briggs of Columbus, South Carolina, provided further explanation of the Secretary of Labor's decision on the coverage of church-related elementary and secondary schools under State unemployment compensation laws. The comments respond to the question of whether certain teachers employed by members of an association of religious schools come within the scope of the exclusion contained in section 3309(b)(1) of the Federal Unemployment Tax Act (26 U.S.C. 3301 *et.* seq.), and in pertinent part states:

"In order to properly understand this question it may be helpful to briefly review the legiislative [sic] history of the 1970 and 1976 amendments. In the 1970 Amendments (Public Law 91-373) Congress extended unemployment insurance-coverage" "to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State unemployment compensation laws cover those services effective January 1, 1972, as a condition for certification of the States for tax credit purposes under the Federal Unemployment Tax Act (FUTA). States were, however, permitted to exempt from coverage certain services described in section 3309(b), FUTA, including services performed:

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education.

"It is obvious that under paragraph (3) employment in nonprofit elementary and secondary schools could have been exempted from coverage.

"The 1976 Amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage effective January 1, 1978, to

nonprofit elementary and secondary schools, as well as all State and local government workers. Although retaining the limited exemptions under paragraphs (1) and (2) above, the Congress removed the exemption authorized in paragraph (3) relating to employment in nonprofit elementary and secondary schools."

"The issue considered by the Secretary of Labor was whether, as a result of the repeal of paragraph (3), employees of elementary and secondary schools that happened to be "church-related" could now be exempted from State law coverage under paragraph (1). Secretary Marshall's decision was announced on April 18, 1978, in a letter of that date to The Most Reverend Thomas C. Kelly, O.P., General Secretary of the United States Catholic Conference, a copy of which was previously furnished to you. Secretary Marshall concluded that the repeal by Congress of the exemption in section 3309(b) (3), FUTA, was clearly intended to result in State coverage of all nonprofit elementary and secondary schools, including church-related schools.

"With respect to services performed in elementary and secondary schools that are church-related, some employment in the schools may be of a type that would come within the scope of the exemption permitted by section 3309(b)(1), FUTA, if the services performed are strictly church duties performed by church employees at the schools pursuant to their religious responsibilities. However, the exemption in section 3309(b)(1)(A) relating to church employees exempts no other activities performed in elementary and secondary schools since the

schools are not churches within the meaning of that section. The exemption contained in section 3309(b)(1)(B) applies only to services performed for organizations that are operated, supervised, controlled, or principally supported by a church and are primarily engaged in religious activities. The only educational institution recognized as falling within this exemption would be an institution for the training of candidates for the priesthood, ministry or rabbinate.

"In summary, it should be emphasized that the exemptions contained in section 3309 (b) are of mixed legal types and must be rationalized in order to achieve the purposes of the statutory provisions. For example, section 3309(b)(2) exempts the "ordained . . . minister . . . in the exercise of his ministry . . . ," obviously an exemption for a particular *kind of employee* only while the employee is engaged in the activities of the specific occupation. By contrast, former section 3309(b)(3) exempted all employees of a particular *type of establishment*, 'a school which is not an institution of higher education.' Likewise section 3309(b)(1)(A) exempts employees of the type of establishment which is a church or 'house of worship.' However, section 3309(b)(1)(B) adds another dimension beyond 'house of worship' which is definitionally confined to 'an organization which is operated . . . by a church or convention or association of churches.'

"Reading the provisions of section 3309(b) together, and giving meaning to the words of each exemption in accordance with the purpose of the statute, reasonably leads to the conclusion that 'organization' as contained in section

3309(b)(1)(B) does not encompass elementary or secondary schools since separate language formerly contained in section 3309(b)(3) exempted such instititutions [sic]. The only educational institutions that may be included within the term 'organization' as used in section 3309(b)(1)(B) are those institutions training candidates for occupations such as the priesthood, ministry or rabbinate because those occupations are 'primarily religious' and involve duties of a nature consistent with the activities usually associated with a 'church' as a *kind of establishment*. In other words, if the activities conducted at the establishment are those ordinarily constituting the operation of an elementary or secondary school, the activities cannot be the kind of activities of a 'church' or 'organization' that are exempted by section 3309(b)(1).

"Because FUTA is a remedial statute aimed at overcoming the evils of unemployment it is to be liberally construed to effectuate its purposes see *United States v. Silk*, 331 U.S. 704, 712 (1947) (Social Security Act); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (Fair Labor Standards Act, and exemptions are to be 'narrowly construed . . . and their application limited to those establishments plainly and unmistakably within their terms and spirit,' *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (Fair Labor Standards Act), thereby avoiding 'difficulties for which the remedy was devised and . . . adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.' *U.S. v. Silk, supra*. Many years ago Circuit Judge Goodrich observed:

> Finally, there is this comment to be made with regard to the nature of these [unemployment compensation] statutes. These are not penal statutes nor are they, except incidentally, revenue statutes. They are to be classed under the broad, though indefinite, heading of social legislation. The classes of workers to be covered by this legislation are very broad. The exemptions are, in general, rather narrow and become more so as the scope of this legislation is widened from time to time. We think that courts should not be eager to extend the scope of the exceptions by artificial construction of language broadening them beyond what Congress has prescribed. *Farming, Inc. v. Manning,* 219 F.2d 779, 782 (CA 3, 1955).

"We do not think it is advisable to attempt to draw any definitive outlines in advance of all of the services that would constitute church duties performed by church employees pursuant to their religious responsibilities within schools. What we have said should furnish guidance on the scope of permissible exemptions. The following examples may be of further help.

"In the first example, a minister has an office in his church where he performs his ministerial duties with the assistance of a secretary, and they also have an office in a church-related school where they perform the same duties. The office in the school is in effect an extension of the church, and since exempt duties are being performed the exemption under section 3309(b)(1)(A) may apply.

"In the second example, a person is employed as a sexton by a church and also as a janitor for the

> church-related school. When performing custodial services for the church, the sexton clearly may be exempt under section 3309(b)(1)(A) since he is employed by an exempt establishment. However, when performing custodial services as a school janitor the exemption would not be applicable because the janitorial duties do not constitute church duties or a performance of religious responsibilities within the school and the janitor is not employed by an exempt establishment."

In addition to the Briggs letter quoted above, the Department's position on coverage of employees of church-related elementary and secondary schools has been more fully explained in a *Memorandum of Points and Authorities* filed by the Department in the case of *Independent Baptist Church v. Tennessee*. Copies of the brief have been furnished to the State agencies through the regional offices.

2. *Question*:

Does the Secretary's decision on coverage of church-related elementary and secondary schools also change the application of the exclusion in section 3309(b)(1)(A) and (B) as they apply to other organization?

Answer:

No. The decision made by the Secretary of Labor in his letter of April 18, 1978 to Bishop Kelley only affects the exemption of church-related elementary and secondary schools under these provisions. The exemptions still apply to other organizations in the same way they did before the Secretary's decision. Thus, the factors governing the application of the exclusions in section

3309(b)(1)(A) and (B), FUTA, as set forth in the answer to question 2 on page 6 of Supplement 2 *1976 Draft Legislation*, issued February 2, 1977, are still valid in determining whether other organization [sic] are exempt under those provisions.

STATE OF WISCONSIN
CIRCUIT COURT
ST. CROIX COUNTY

SOLDIERS OF JESUS CHRIST, INC.,

Plaintiff,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant,

DEPARTMENT OF WORKFORCE DEVELOPMENT,

Defendant, and

KENNETH H. KUBE,

Defendant.

PLAINTIFF'S BRIEF

File No. 98-CV-187

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* * *

STATEMENT OF FACTS

The Commission made the following findings of fact concerning the plaintiff, the "employer":

> The employer's founder, director and pastor for 25 years had been Kenneth Sortedahl. Mr. Sortedahl described the employer as a Christian Boarding School. The employer was incorporated in 1971 in St. Croix County and goes by the name of Soldiers of Jesus Christ. [fn omitted] The employer testified that its school name is

Peniel, but the mission and the school are under the Soldiers of Jesus Christ Corporation.

The school takes in students with life control problems, i.e. children who have been in trouble with the law, in their homes, and in their community. Students stay at the school for one year. The school consists of 150 acres with three houses, one for a school, one for a boy's dorm and one for a girl's dorm. There are three trailer houses for staff. There is also a barn. At the time of the hearing the employer had 18 students and 7 people performing services for the school. The employer operates mainly on donations. It is supported by churches of all denominations. It does charge tuition but students are not required to pay a certain amount. It costs up to $1,000 per month, but not all the students pay that much.

Christian services occur twice a day including devotions in the morning and evening. Christian services are conducted in the school itself. The employer holds Christian services in the meal area after tables are cleared. The employer uses a "Christian" curriculum[2] Mr. Sortedahl is a Lutheran pastor but does not preach Lutheran doctrine.[3] If he did that, Jewish people would not send their children because the employer would make Christians out of them. The employer just preaches the Bible in its

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[2] Pastor Sortedahl specifically identified the curriculum as the "Accelerated Christian Education curriculum" Transcript ("T:") p. 10].

[3] Pastor Sortedahl did testify, however, that the plaintiff (church and school) was his full-time ministry. (T:18)

> services. The employer does not follow any doctrine nor does it criticize any doctrines. The employer considers the school to be "cross-denominational." It takes students of any denomination or no denomination. The employer has baptism services on the ground and is open to having visitors come to services.

(Record p. 6).

In addition to twice-a-day religious services; "preaching the Bible"; a "Christian" curriculum; and baptismal services; the evidence is also undisputed that communion services were held every Monday morning and that the school welcomed "visiting pastors" who would lead devotions (Record p.16; T:15)

The staff are all volunteers. There is no promise they will be paid. They are paid if there is money to pay them. (T:11-12).

Pastor Sortedahl also testified the corporation has always been recognized by the IRS[4], the Wisconsin Department of Revenue, and local governments as a tax exempt organization. (Record p. 17; T:19-21) Pastor Sortedahl also testified plaintiff's deed was listed with the

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[4] The Commission cites a letter by the Chicago office of the IRS which stated plaintiff had not been recognized as exempt. (Record p. 6). Pastor Sortedahl testified, however, that the Eau Claire office of the IRS, which is responsible for the covered territory, has always recognized plaintiff as exempt and indeed has always recognized donations to plaintiff as tax exempt. (T: 19-20) This is uncontradicted. Indeed, a religious organization is not required to actually register under Section 501(c)(3) of the Internal Revenue Code and this may explain why the Chicago office has no record. Treasury Regulation 1.508-1(a)(3)(i)(a); T:6.

St. Croix County Register of Deeds as a non-profit "church and school" pursuant to Chapters 181 (non-profit) and 187 (religious society). (Record p. 20-21; T: 36-38)

An employee of the Department who makes the initial determination concerning tax exempt status also testified. She had worked for the Department for 25 years and was a U. C. tax and accounting specialist for the last 12. (T:31) In 1995 she did an investigation of Plaintiff's status and determined it was an exempt religious institution based primarily upon her conversations with Mr. Sortedahl. (T:33) She agreed that her assessment would probably be the same having heard the testimony presented at the hearing. (Record p. 20; T:34)

Defendant has filed multiple wage and unemployment compensation claims against plaintiff in both Minnesota and Wisconsin. All other claims have been denied. (T:23)

ARGUMENT

1. Standard of Review

LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence[5]. Wis. Stat. § 102.23(6); *Nottelson v. DILHR*, 94

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[5] The reviewing court normally defers to the fact finding body on questions of fact. However, the Commission's findings are based upon a written record, not witness testimony. Like this Court, they are an appellate body. The Commission is thus in no better position to determine credibility than any other court reviewing a cold record. The ALJ's findings of fact should be given deference, not LIRC's.

Wis.2d 106, 114, 287 N.W.2d 763, 767 (1980). The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1094, 236 N.W.2d 255, 259 (1975). Any legal conclusion drawn by LIRC from its findings of fact, however, is a question of law subject to independent judicial review. *Nottelson*, 94 Wis.2d at 114-15, 287 N.W.2d at 767.

2. Plaintiff's mission is operated "primarily for religious purposes" *and* is "principally supported by a[n] association of churches."

The Commission found plaintiff was not an organization operated primarily for religious purposes:

> From the evidence presented at the hearing it is first and foremost a school. Again, there is a lack of testimony about the precise role of religion in the school curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it *difficult to* find that the school operates **primarily** for religious purposes. In fact, it seems the primarily (sic) objective of the employer is keeping kids out of trouble while providing an education and room and board.

(Emphasis original) (Record p. 12).

The Commission's decision is both legally and factually indefensible.

The Commission conceded plaintiff "is religious in nature." (Record p.12) Just not, apparently, religious

enough. Plaintiff need not, however, show religion "pervades" the operation of the school in order to show it is operated "primarily" for religious purposes. "Primarily" means " 'of first importance.' 'principally,' 'essentially,' or 'fundamentally' as opposed to 'secondarily' or 'merely incidental.' " *Department of Employment v. Champion Bake-N-Serve, Inc.*, 100 Idaho 53, 592 P.2d 1370, 1372 (1979), citing *Malat v. Riddell*, 383 U.S. 569 (1966). In addition, "primarily" does not mean proportional:

> 'Primarily' is an adverb and, as the word implies, it modifies the word "operated." It has no purpose or implication in this sentence as to the relative proportion of subject matter of a religious nature that must be provided. . . . The exemption statute simply requires that the purpose of the organization and its operation or support be primarily religiously oriented in the conduct of its activity. This exemption statute does not requir or suggest the weighing of hours of secular and religious instruction or other activity.
>
> The exemption is determined by the purpose of the existence and operation of the school. If that purpose be primarily of a religious nature, the exemption applies without regard to the proportion of time devoted to religious instruction.

Czigler v. Administrator, Ohio Bureau of Employment Services et al, 501 N.E.2d 56, 57 (1985). See also e.g. *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P.2d 1178, 1183 (& fn 7) (1986) (Nondenominational Christian high school operated "primarily for religious purpose" even though primary goal may have been educational); *In re: Hollis Hills*

Jewish Center, 461 N.Y.2d 555, 92 A.D.2d 1039, 1039-1040 (1983) (Nursery school teachers at nursery run by non-profit religious organization exempt from state unemployment compensation laws as "person[s] employed at a place of worship . . . for the performance of duties of a religious nature. . . . "); *Department of Employment v. Champion Bake-N-Serve, Inc.*, 592 P.2d at 1371-1372 (1979) (Students employed in bakery as part of Seventh Day Adventists high school curriculum was "primarily for religious purposes.")

In addition, a "religious purpose" clause should be liberally construed to favor exemption. See *Hollis Hills*, 461 N.Y.2d at 556. cf. *In re: Klein*, 164 A.D.2d 9, 11, 563 N.Y.2d 132 (1990) (Characterization by employer that its operation of school was related to religious objectives, made in good faith, must be accepted by civil courts.) See also *Verdecchia v. Unemployment Compensation Board of Review*, 657 A.2d 1341, 1345 (1995) (Statutory language "operated primarily for religious purposes" creates imprecise standard. While normally exemptions would be strictly construed against the employer the rule is superceded in instances where there is a strong possibility the statute may infringe upon a party's right to free exercise of religion.) *Czigler*, 501 N.E.2d at 59 (Courts should apply liberal construction of "religious purposes" to avoid potentially serious entanglements with Establishment clause of the First Amendment.)

The Commission concedes plaintiff "is religious in nature." (Record p.12) That finding alone is enough to meet the "religious purpose" standard. In addition, the undisputed evidence plaintiff held twice-a-day religious services; "preached the Bible;" used the "Accelerated

Christian Education curriculum; " conducted baptismal services and weekly communion services; used "visiting pastors" to lead devotions; relied heavily on volunteers; was self-described as the "Soldiers of Jesus Christ"; and was founded and lead by an ordained Lutheran minister; all underscores the religious mission of the organization and the school. While the primary goal of the school may have been, as the Commission found, to keep "kids out of trouble while providing an education and room and board," the motive for doing so and the distinctive means by which it was done is religious in nature. The first half of the test is clearly met.

The Commission also denied exemption under the second part of the statute because "there is really no evidence of any particular church or group or association of churches that has lent support, moral or otherwise, to the employer." (Record p. 12). The Commission's decision is, again, neither factually nor legally correct.

The Commission's decision contrasts sharply with the Idaho Supreme Court's holding in *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P.2d 1178, 1182 (1986), a case cited at length by the Commission itself in support of its "church" and "religious purpose" argument. In *Nampa*, the issue, among others, was whether a corporate, nondenominational "Christian" high school was "principally supported by an association of churches." There was no formal associative body and the support was not financial, as 85 % of the school's revenues came from tuition. *Id.* at 1179. Instead, the school relied upon the "moral" support of various local churches. *Id.* at 1179, 1184. The court held the exemption was met.

The Idaho court began by acknowledging "no definition of the term 'convention or association of churches' exists. . . . " (*Id.* at 1183). The court then adopted a "broader" definition, that being:

> The act of associating, or the state of being associated; fellowship; combination for a common purpose,. . . . Thus . . . the term applies to a 'cooperative undertaking by churches of differing denominations',. . . .

Id. The (Idaho) department nevertheless objected arguing that "principal" support had to include financial support. The Court disagreed:

> The statutory language of [Idaho's equivalent to Wis. Stat. § 108.02(15)(h)2] does not require a church's or groups of churches' support to be financial in order for that to be recognizable under the statute. The statute merely states "support." While a contribution of money is a strong indicia of one's support, it cannot be held, statutorily, to be the only way to support an organization.

Id. at 1184. The question is ultimately one of dependency. If the school is dependent upon the churches' support – whether moral, financial or otherwise – it is "principally" supported for the purposes of the statute. *Id.*

In short, a [sic] "a church or convention or association of churches" requires only common "support" of the school purpose by one or more churches. It does not require any formal relationship. "Principally supported" means only a dependency on that support, whether it be moral, financial or otherwise.

The evidence that plaintiff met the exemption is even stronger than it was in Nampa. Here the mission is supported almost entirely by donations (85%) rather than tuition (15%). Pastor Sortedahl stated the mission receives "support" from "churches of all denominations." (T:16) "[D]ifferent pastors" come and lead services. (T:15) Churches also assist in the fund raising.[6] (Record 18; T:27) Finally, Pastor Sortedahl is an ordained Lutheran minister whose full-time ministry is the school and mission. (T:18)

The "support" from "churches of all denominations" alone meets the *Nampa* test. This is particularly true when that support is likely financial – given the heavy dependence on donations – in addition to moral support for the mission's objectives. It also includes donated services by "visiting" pastors. It includes the use of church facilities for fund raising. The Commissions' complaint that there was no evidence of a "particular church" of "particular association of churches" has no legal basis and is clearly rejected in *Nampa*. Indeed, the churches in *Nampa* were only identified as "local churches" and "a number of churches in the Treasure Valley area." *Id.* at 1179. The Nampa churches were no more "particular" than the churches identified by Pastor Sortedahl.

Alternatively, one could argue plaintiff was supported by a "church" because of Pastor Sortedahl's status as an ordained Lutheran minister. (Record p. 55). The school and mission are Pastor Sortedahl's full-time ministry. (T:18) By permitting Pastor Sortedahl to engage in

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[6] Defendant testified he made fund raising telephone calls from "another church." T:27.

this "mission" as an ordained minister of the Church, the "Lutheran Church," if one defines "church" in the larger sense, could be said to principally support plaintiff's mission and school. Indeed, without Pastor Sortedahl and the blessing of the Lutheran Church, the school would likely cease to be.

3. Alternatively, Plaintiff is a "church" within the broad definition of the term.

The Commission conceded neither Wisconsin Statutes nor "FUTA" defines the term "church." The Commission thus chose to rely upon the IRS's "14 criteria."[7] Applying those criteria, it found plaintiff "completely meets very few of the 14 criteria." In particular, "the evidence presented by the employer doesn't establish that (2) through (9) and (13) and (14) have been met." The Commission further found the "lack of evidence in this case of the role of religion in the employer's existence, let alone its school, is striking" as the "commission simply

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[7] (1) A distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline' (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of ministers. *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P.2d 1178, 1182 (1986).

does not know what constitutes a 'Christian' curriculum." (Record p. 11) Finally, the Commission opines that holding religious services does not make the employer a church. The Commission concedes the church exclusion is not dependent upon the existence of a physical "house of worship," citing *St. Martin Evangelical Lutheran Church et al v. South Dakota,* 451 U.S. 772 (1981).

What constitutes a "church" is a question of first impression in Wisconsin. The 14 IRS criteria have never been accepted by a Wisconsin Court. They should not be accepted in this instance as they simply don't fit a Christian, but nondenominational religious institution. If one views a "Christian" "Church" in the larger sense, then many of the criteria do apply. For example, when compared in a general sense to other major religious faiths such as Islam and Buddism (which also have a multitude of sects and doctrinal variations), "Christianity " has a recognized creed and form of worship; a formal code of doctrine and discipline; a distinct religious history; ordained ministers; and a literature of its own. Plaintiff, in particular, has a distinct legal existence; a membership not associated with any particular church or denomination; an establish place of worship; regular congregations (the students and staff); and regular religious services. In short, depending on how liberally one approaches the task, the criteria can be mostly met in this case.

Plaintiff's primary argument, however, is that since "church" has not yet been specifically defined in Wisconsin, the Court should define it very liberally in order to avoid "entanglement" with first amendment concerns. See, *supra, Hollis Hills,* 461 N.Y.2d at 556; *In re: Klein,* 164 A.D.2d at 11; *Verdecchia v. Unemployment Compensation*

Board of Review, 657 A.2d at 1345; *Czigler*, 501 N.E.2d at 59. Indeed, a liberal approach is consistent with the apparent policy of the Department in determining initial exemption, which is to accept, for the most part, an institution's self-description as a "church". (T:33). Here the Department need not go quite that far as there is, in the record, significant evidence of religious activity, religious orientation; an ordained minister; religious services; and incorporation as a church as well as a school. (T:37). For the purposes of Wis. Stat. § 108.02(15)(h)1, plaintiff is a "church."

CONCLUSION

The Commission's decision should be reversed. It ignores facts favorable to the plaintiff. It chooses the strictest possible legal standards, none of which have been accepted by Wisconsin Courts, and interprets them as strictly as possible to deny the exemption. While admittedly the record could have been better, the Court should understand this was one of at least four wage and unemployment related claims brought against the plaintiff by this defendant, a disgruntled employee and a felon with a fraud conviction. All of the claims, except this one, have been denied. This claim, like the others, is part of an harassment campaign designed to cost the plaintiff time, energy and attorney's fees.

As it has for 27 years, plaintiff meets the U.C. exemption either as a "church" or as an "organization operated primarily for religious purposes and . . . principally supported by a church or convention or association of churches."

The decision of the Commission should be reversed.
Dated this 25th day of September, 1998.

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STATE OF WISCONSIN ST. CROIX COUNTY
CIRCUIT COURT
BRANCH 2

SOLDIERS OF JESUS CHRIST, INC.,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF WORKFORCE DEVELOPMENT, KENNETH H. KUBE,

Defendants.

BRIEF OF DEFENDANT LABOR AND INDUSTRY REVIEW COMMISSION
Case No. 98CV187
Classification No. 30607

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October 22, 1998

* * *

ISSUE

Did the commission properly find that the employe's employment with the employer was not excluded employment, within the meaning of Wis. Stat. 108.02 (15)(h), and that the employe was therefore eligible to

claim unemployment compensation benefits based on that employment?

ARGUMENT

* * *

As the commission will discuss in this brief, the question of whether the employer's school constitutes a "church" under Wis. Stat. 108.02 (15)(h), as well as the question of whether the school is an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches, are questions which are intertwined with factual, value, and policy determinations.

* * *

II. THE EMPLOYER FAILED TO DEMONSTRATE THAT ITS SCHOOL WAS OPERATED PRIMARILY FOR RELIGIOUS PURPOSES AND ALSO FAILED TO DEMONSTRATE THAT IT WAS OPERATED, SUPERVISED, CONTROLLED, OR PRINCIPALLY SUPPORTED BY A CHURCH OR CONVENTION OR ASSOCIATION OF CHURCHES.

A. The Employer's School Was not Operated Primarily For Religious Purposes.

The employer takes partial issue with the commission's findings that the evidence shows the employer's school is religious in nature, but that its primary objective is to keep at-risk children out of trouble while providing education, and room and board (R.12). On page 8 of its brief, the employer concedes the school's primary objective "may have been" as described by the commission, but argues that the motive and means for reaching this

objective were religious in nature. There can only be one "primary purpose" for an organization, and the commission concluded that the evidence showed the employer's *primary* goal was the laudatory one of reclaiming troubled children for society, but not fostering or promoting a religious purpose.

The commission is limited to review of the evidence presented at the administrative hearing. ***Northwestern Insulation v. LIRC,*** 147 Wis. 2d 72, 79-80, 432 N.W.2d 620 (1988); ***Joseph Schlitz Brewing Co. v. DILHR,*** 67 Wis. 2d 185, 192-93, 226 N.W.2d 492 (1975). The sum total of evidence the employer presented of an alleged primary religious purpose was the following testimony by Mr. Sortedahl:

(1) . . . we just preach the bible (T.16)

(2) . . . the children have a Christian curriculum, called Accelerated Christian Education curriculum (T.10)

(3) . . . We have Christian service twice a day (T.9)

(4) . . . We've had baptisms. . . . right on the grounds (T.14)

(5) . . . we just have communion there, each Monday morning but we don't get into any kind of doctrine as far as the millennial reign and all of that goes (T.17)

(6) . . . I'm a Lutheran pastor, but I don't preach Lutheran doctrine. . . . then the Jewish people wouldn't send their children because they would say well, they're going [to] make Christians out of them (T.16).

Any parent intending to send his or her child to a school primarily religious in its purpose would, at best, be confused and unconvinced that the above indicia described such a school. What is an Accelerated Christian Education curriculum? What teachings of the Bible are preached, and how often? What transpires during the cross-denominational Christian services, which apparently would be acceptable to those of the Jewish faith as well as those of no denomination (T.16)? Are students required to attend these services? Under what religious authority were baptisms conducted, and who attended them? Under what religious authority is communion distributed each Monday, and what does communion mean to Mr. Sortedahl? What does Mr. Sortedahl tell the communicants about what they are receiving, and do the students attend and receive this communion? If Mr. Sortedahl does not preach Lutheran doctrine, of what relevance is it that he is a Lutheran minister without a Lutheran ministry?[4] Mr. Sortedahl indicates that he does not get into any kind of doctrine, and the evidence leaves

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[4] In its brief, the employer asserts that Mr. Sortedahl's full-time Lutheran ministry is the "school and mission" (employer's brief, p.9), and that he administers the school with "the blessing" of the Lutheran church (employer's brief, p.10). It is important to note that these factual assertions are not supported by the record. On page 18 of the hearing transcript, Mr. Sortedahl describes his career and the means by which began the employer's school. There is no indication that anyone other than he and his wife founded the school, and certainly no evidence that the school has any affiliation with the Lutheran church or receives any support or "blessing" from the Lutheran church.

one confused and guessing as to what he does get into from the standpoint of a religious purpose.

The commission believes the evidence shows the employer's school has a primarily rehabilitative purpose, in that it provides a sheltered educational environment, including room and board, for one year for children who have been in trouble with the law (T.9). A parent with a child who had been in trouble with the law would know he/she had found a school designed to assist his/her child by virtue of Mr. Sortedahl's simple, straightforward statement to that effect on page 9 of the hearing transcript. There is nothing ambiguous about this evidence.

Mr. Sortedahl is no doubt a good man, and his primary personal motives in devoting himself to working with troubled children are no doubt Christian in nature. However, the statutory test of covered employment does not properly apply to Mr. Sortedahl's, or other teachers', personal motives. It is properly applied to the operation of a boarding school which the credible evidence demonstrates is primarily operated to shelter and rehabilitate troubled youth in a limited-term setting.

In its brief, the employer has made reference to several cases from outside Wisconsin's jurisdiction. Initially, it must be recalled that Wisconsin courts have specifically rejected the argument that they should look to other jurisdictions' interpretations of unemployment compensation acts, be they federal or other state interpretations, to attempt to interpret Wisconsin's Unemployment Compensation Act. ***Bernhardt v. LIRC,*** 207 Wis. 2d 292, 302, 558 N.W.2d 874 (Ct. App. 1996); ***Moorman Mfg. Co. v. Industrial Commission,*** 241 Wis. 200, 207, 5 N.W.2d 743

(1942). But even upon examination of the cases cited by the employer, one does not find support for the employer's position.

The employer cited ***Nampa Christian Schools Foundation, Inc. v. State of Idaho, Department of Employment,*** 110 Idaho 918, 719 P.2d 1178 (1986). In ***Nampa,*** a Christian high school was formed and operated by a corporate board of trustees who were required to be members of good standing in a local church or fellowship, and were required to agree to a Statement of Faith professing very specific elements of Christian doctrine. ***Id.*** at 919. Also, see the commission's decision listing these elements at page 8 of the Record. Nampa's students were required to attend chapel services and Bible study, and "religion pervades every aspect of the educational program" at the school. ***Id.*** at 919. The school's articles of incorporation state the purposes of the school as: (1) to instruct in all subjects "on the basis of the Biblical philosophy of creation, history and destination"; (2) "to teach the Bible, Biblical and historical theology, the science of Christian education, the history and methods of missions, and other related subjects"; (3) "to educate persons through [its] schools and, as the opportunity may arise, through additional course work, Bible Institute and Seminary training as may be appropriate."

Clearly, Nampa School is wholly unlike the employer's school. Nampa has a primary, defined, and mandatory religious purpose, while the employer's school was established to rehabilitate troubled children. Mr. Sortedahl loosely interjects anecdotal elements of Christianity into the school's curriculum, to some undefined extent, but there is not a primary purpose to teach a

Christian religion. Drawing the distinction between schools such as Nampa and schools such as the employer's involves precisely the type of factual, value, and policy determinations which the commission is legislatively and judicially mandated to perform. It is the commission's business to weigh the evidence and determine the values and purpose of a particular school. From a policy standpoint, it would be inappropriate to grant exclusion from unemployment compensation coverage to every school which merely claims affinity with the Christian or other faith. Wis. Stat. 108.02 (15)(h)2. is, by its unambiguous terms, designed to exclude from coverage organizations operated primarily for religious purposes. It is not designed to exclude from coverage schools operated for a beneficent but primarily non-religious purpose, which may be administered by men and women who are personally religious. In interpreting the unemployment compensation statutes, the commission and the courts must be mindful of the fundamental objective of Wisconsin's Unemployment Compensation Act, which is to mitigate economic loss to the unemployed worker and his/her family. ***Milwaukee Transformer Co. v. Industrial Commission,*** 22 Wis. 2d 502, 511, 126 N.W.2d 6 (1964); ***Moorman Mfg. Co. v. Industrial Commission,*** 241 Wis. at 204-05.

The employer also cites ***In the Matter of Hollis Hills Jewish Center,*** 461 N.Y.2d 555, 92 A.D.2d 1039 (1983), which held that teachers in a nursery school " . . . operated in accordance with the mandates of the Jewish religion and emphasiz[ing] the beliefs and principles of that faith" were employed at "a place of worship . . . for the performance of duties of a religious nature." ***Id.*** at

556. The differences between this Jewish nursery school and the employer's school are too obvious to belabor.

Department of Employment v. Champion Bake-N-Serve, Inc., 100 Idaho 53, 592 P.2d 1370 (1979), is another non-analogous citation by the employer. That case involved a high school owned and operated by a corporation solely composed of Seventh Day Adventists, who required students to take 40 credit hours of Seventh Day Adventist religious instruction in addition to a secular high school curriculum, as well as to perform labor in a bakery (or other location) as a part of their religious training. ***Id.*** at 54. The primary purpose of the bakery was to provide students with work experience as part of their religious training. ***Id.*** If the bakery did not turn a profit the Seventh Day Adventist's corporation absorbed the loss. ***Id.*** The court held the bakery was operated primarily for a religious purpose; namely, it provided a method for satisfying a required tenet of religious training for these Seventh Day Adventist students. No religious tenets were established or satisfied at the employer's school.

Finally, ***Verdecchia v. Unemployment Compensation Board of Review,*** 657 A.2d 1341 (1995), a Commonwealth Court of Pennsylvania case, involved unemployment compensation claimants who had worked at St. Joseph's Personal Care Residence, a Roman Catholic establishment which ministered to poor and elderly individuals. ***Id.*** at 1343. St. Joseph's was not a separately incorporated legal entity, but was under the direct control of the Roman Catholic Diocese. ***Id.*** at 1346. The court held that the Diocese operated St. Joseph's as part of its ministry to the poor, and primarily for a religious purpose. ***Id.*** Again, we

see the "primarily religious purpose" label applied to a defined, and in these cases well-established, religious organization which sponsors, controls, and directs the institution at issue for a straightforward religious purpose. The employer's school simply does not come close to matching the factual circumstances of these cases.

Since the employer has cited out-of-state decisions in this matter, the commission would point to a case in which the facts were more analogous to those in our case. In ***Pittsburgh Leadership Foundation v. Unemployment Compensation Board of Review,*** 654 A.2d 224 (1995), also a Commonwealth Court of Pennsylvania case, the Foundation was described as a "Christian-based organization" organized as a nonprofit corporation, which provided counseling for troubled youth, prisoners, addicts, and victims of abuse. ***Id.*** at 225. The court affirmed the Board of Review's finding of unemployment compensation coverage stating:

> "Further, it is not this Court's function to usurp the Board's role as factfinder when the Board's determination is supported by substantial evidence, as in this case, that petitioner's primary function and activities cannot be deemed those of a religious organization, exempt from the requirements the Law imposes upon employers." ***Id.*** at 226.

B. The Employer's School Was Not Operated, Supervised, Controlled, Or Principally Supported By A Church Or Convention Or Association Of Churches.

The employer argues that its school was principally supported by a convention or association of churches,

relying on its interpretation of the *Nampa* case. As the commission noted in its decision, it has previously found that the *Nampa* holding that "moral support" satisfies the statutory requirement of principally supported[5] is unpersuasive (R.10-11). Aside from the overly-broad holding of *Nampa,* the case must be viewed in light of its facts and circumstances, which as previously detailed, differ substantially from the facts and circumstances of our case.[6] The *Nampa* court determined that the high school in that case could not have continued to exist as a private school, without the "moral support" of the group of churches which formed a corporation and required adherence to strict tenets articulated in the Statement of Faith. *Id.* at 924. There was no corporation of sponsoring churches in our case, nor did any church or other association offer any support in the form of moral direction. The employer's school exists as an independent, nonprofit organization.

The employer goes on to argue that in its view, the question of whether its school was principally supported by a church or association of churches is ultimately a question of dependency (employer's brief, p.9). The word "dependency" is introduced by the employer rather than by any statute or case law. The employer attempts to rely

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[5] *Nampa Christian Schools Foundation, Inc. v. State of Idaho, Department of Employment,* 110 Idaho at 924.

[6] The commission must decide each case based on that case's particular facts and circumstances. *Glodowski v. Industrial Commission,* 11 Wis. 2d 525, 530, 105 N.W.2d 833 (1960); *State v. Industrial Commission,* 4 Wis. 2d 472, 475, 90 N.W.2d 397 (1958).

on the fact that its school depended upon financial support from "churches of all denominations" (T.16). However, most nonprofit organizations are dependent to some extent upon financial support from sympathetic donors. The rehabilitative work which the employer performs with its students is certainly admirable. It is likely to inspire individuals and organizations of all types, who become aware of the school's work, to donate to it. But the employer has failed completely to identify any "church or convention or association of churches"[7] which principally supports its school.[8] In fact, one of the duties the employe performed for the employer was that of "telemarketer" or "fund raiser," indicating the employer sought financial support from broad-based, universal sources rather than any particular association or grouping of churches (T.22,27). Perhaps most important, the employer provided no breakdown of sources of income, and identified no supporting convention or association of churches, but asked the commission and now the court to overlook this evidentiary failure and create a finding out of whole cloth.

III. THE EMPLOYER FAILED TO DEMONSTRATE THAT IT IS A "CHURCH," AS THAT TERM IS USED IN WIS. STAT. 108.02 (15)(h)1.

The employer first argues that "depending on how liberally one approaches the task,"[9] Mr. Sortedahl's use of

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[7] Wis. Stat. 108.02 (15)(h)2.

[8] The commission noted this fact in its decision (R.12).

[9] Plaintiff's brief, p. 11.

the term "Christian" to describe the employer's school, could support a finding that the school is a "church" in the statutory sense. The employer asserts that the term "Christianity" calls to mind a recognized creed and form of worship, doctrine, history, literature, and ministers of its own. The employer's argument is not liberal, it is nonsensical. There are numerous Christian churches such as Lutheran, Roman Catholic, Presbyterian, Eastern Orthodox, Mormon, Jehovah's Witness, et cetera. But there is no Christian church where there is no definition or substance to the elements of doctrine, worship, history, ministers, et cetera. Neither is there a general consensus among these churches about what Christianity means. Once again, the employer looks to the court to rescue it from the facts by inventing reality. The reality is that the employer's school possesses an anecdotal element of Christianity by virtue of the vaguely-described Christian teachings and services interjected by Mr. Sortedahl and perhaps by other teachers. While the commission understands and respects why Mr. Sortedahl may wish to expose his students to some Christian teachings without aligning his school with any particular Christian church or doctrine, the fact is that his school is not a "church" in even the broadest sense of the term. Were the court to find, based on this record, that the school was a "church" for purposes of Wis. Stat. 108.02 (15)(h)1., then any organization into which some elements of Christian teachings were introduced could claim exemption from unemployment compensation coverage.[10]

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[10] It is important to note that the evidence demonstrates the employer's corporation, Soldiers of Jesus Christ, Inc., is not

Here again, important value and policy considerations inherent in the interpretation of the statute are evident. The commission is entitled to great deference when applying a statute to a particular set of facts and circumstances such as in this case, wherein the fundamental purpose of the Unemployment Compensation Act must be balanced against the purpose of the coverage exclusion for churches. The statutory concept of what constitutes a "church" should not be broadened beyond reason, thus depriving otherwise eligible workers from the protection of unemployment compensation.

Finally, the employer ends its brief by asserting that its primary argument is that "church" should be interpreted liberally in order to avoid entanglement with "First Amendment concerns." The employer fails to articulate what concerns it sees,[11] but merely cites to four out-of-state decisions which addressed the First Amendment question in varying contexts. In ***Verdecchia v. Unemployment Compensation Board of Review,*** 657 A.2d at 1345, the court cautioned that imposition of unemployment compensation tax liability on a Roman Catholic Diocese for its operation of an institution ministering to the poor raised the "strong possibility" of constitutional infringement upon free exercise of religion. We have previously

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even recognized as a tax exempt or charitable organization by the Internal Revenue Service or the Wisconsin Department of Regulation and Licensing (Ex. 3,4).

[11] Courts are not disposed to decide the validity of constitutional claims broadly stated but not specifically argued. ***State v. Scherreiks,*** 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989).

seen how dissimilar the employer's school was from the institution at issue in ***Verdecchia.***

In ***Czigler v. Administrator, Ohio Bureau of Employment Services,*** 27 Ohio App.3d 272; 501 N.E.2d 56 (1985), a private, Jewish elementary and high school, "primarily designed for religious purposes,"[12] was excluded from unemployment compensation tax coverage. In so holding, the court addressed arguments raised concerning "First Amendment entanglements" by agreeing that a liberal interpretation of a "religious purpose" statute was in keeping with avoidance of such entanglements. ***Id.*** at 59.

In ***In the Matter of Hollis Hills Jewish Center,*** 461 N.Y.2d at 556, the court merely stated:

> "Moreover, the religious aspects of church-operated schools have recently been acknowledged by our State's highest court (citation omitted).

In ***In the Matter of Shirley Klein v. Harnett, Commissioner of Labor,*** 563 N.Y.S.2d 132, 164 A.D.2d 9 (1990), the claimant, a teacher, was denied unemployment compensation on the basis that a Jewish high school was not covered employment. ***Id.*** at 133. The *claimant* argued that the school's *exclusion* from coverage violated the First Amendment. ***Id.*** The court stated:

> "We find that a reading of the statute at issue here 'affords no basis for a conclusion that the legislative intent was to advance religion' . . . Although one effect of the statute permits religious organizations an exemption

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[12] ***Id.*** at 58.

> from paying contributions for unemployment benefits, any religious benefit is, again, incidental . . . Instead, the statute's primary effect is, in our view, the efficient administration of the Labor Law attained in part by maintaining the concept of the state's 'benevolent neutrality' toward all religion . . . Finally, we discern no 'excessive entanglement' between the statute and religious establishments." ***Id.*** at 134.

In referring to the First Amendment, the employer attempts to substitute a constitutional argument for its failure to introduce facts which could establish the existence of a church or religion at its school. Had the employer presented credible and substantial evidence that its school constituted a church or a religion, the commission would not have hesitated to have found that employment with it was excluded under Wis. Stat. 108.02 (15)(h). Not to so find would have been contrary to the statute, and probably[13] also in contravention of the First

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[13] The Wisconsin Supreme Court stated in ***Jackson v. Benson,*** 218 Wis. 2d 835, 874, 578 N.W.2d 602 (1998):

> "Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." ***Lemon,*** 403 U.S. at 614. Some relationship between the State and religious organizations is inevitable. See ***Id.*** (citing ***Zorach,*** 343 U.S. at 312). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." See ***Agostini,*** 117 S.Ct. at 2015."

Amendment. However, as the commission has previously detailed in this brief, credible evidence of the existence of a church or a religion is not in the record, unless the definition of "church" is broadened well beyond the limits of reason. There could be no First Amendment problem in this case because there was no church or religion involved in it.

CONCLUSION

The credible evidence of record fails to demonstrate that the employer's school, established and operated primarily to shelter and rehabilitate children with a history of trouble with the law, constituted a church, or an organization operated primarily for religious purposes and operated or principally supported by a church or convention or association of churches.

The record demonstrates that the employer's director introduced poorly-defined elements of Christian faith, unaligned with any religious doctrine or authority, into the school's curriculum on an anecdotal basis. While the director's actions and intentions were certainly laudable, his school has not been shown to have had a primarily religious, as opposed to rehabilitative, purpose. Just as clearly, the record reveals that while the employer's school solicited and accepted donations from whatever source it could obtain them, it was not principally supported by any church or convention or association of churches.

The record also demonstrates that there is no credible evidence that the employer's school contained the basic elements constituting a church, but that it functioned to

assist troubled children in overcoming their secular difficulties. The school did not adhere to a defined religious creed or doctrine, had no form of ecclesiastical government, no established places of worship, no religious training of ministers or clergy, no religious history, and no defined or recognized form of worship.

The employer's argument that the statutory concept of "church" should be "liberally defined" in order to avoid entanglement with First Amendment concerns is poorly developed, and constitutes nothing more than an attempt to circumvent the facts of record. The court need not address undeveloped constitutional arguments. Regardless, First Amendment cautions are not relevant to this case in which the facts demonstrate that no reasonable person could construe the employer's school to be a church or religion.

The commission's interpretation of the statute at issue was thoroughly intertwined with factual, value, and policy determinations, and is therefore entitled to great weight. This standard of review requires the court to affirm the commission's decision if it is reasonable, even if the court were to feel that an alternative interpretation would be more reasonable. The commission's decision appropriately balances the fundamental purpose of Wisconsin's Unemployment Compensation Act with the purpose of Wis. Stat. § 108.02 (15)(h), and is the most reasonable application of that statute to the facts presented.

Therefore, it is respectfully urged that the commission's decision in all respects be confirmed.

Dated October 22, 1998

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STATE OF WISCONSIN CIRCUIT COURT
ST. CROIX COUNTY

SOLDIERS OF JESUS CHRIST, INC.,
Plaintiff,

PLAINTIFF'S REPLY BRIEF

File No. 98-CV-187

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
Defendant,
DEPARTMENT OF WORKFORCE DEVELOPMENT,
Defendant, and
KENNETH H. KUBE,
Defendant.

ARGUMENT

The issues raised in the commission's response brief are adequately addressed in plaintiff's opening brief. Plaintiff will therefore only address, as succinctly as possible, several points which require further clarification.

Standard of Review:

The commission cites at length the various statutory and case law standards of review which are applicable to these appeals. The result of that recitation is less than clear. Just so there is no confusion, plaintiff is not contesting any factual finding. The facts, indeed, are undisputed[1]. As the commission acknowledges in its own brief,

[1] The only arguable exception is the question of whether plaintiff is registered as exempt by the IRS or the State of

the meaning of a statute is a question of law; and the application of the statute to the facts is also a question of law. (Commission's brief p. 7; citing *Notteelson v. ILHR Dept.*, 94 Wis.2d 106, 115, 287 N.W.2d 763 (1980)). Nevertheless, the commission claims that because this case involves "a legal question . . . intertwined with factual, value, or policy determinations", its decision is entitled to "great weight." (Commission's Brief p. 7). The commission utterly fails to articulate, however, why a more restrictive standard of review should apply *in this case.* Indeed, this is as clear a case of applying a statute to an undisputed set of facts as there is. Moreover, the religious context – with its First Amendment overtones – makes deference to the administrative determination even less appropriate. Particularly in cases such as this it is the Courts which should have the clearest – and final – word. In short, this Court should apply the undisputed facts to the law without deference to the commission.

Wisconsin. The commission points to a letter from the Chicago Office of the IRS and the State of Wisconsin stating the employer has not been recognized as an exempt organization. Nevertheless, Pastor Sortedahl testified the organization had been recognized as exempt for the past 27 years and further, the Eau Claire office of the IRS would confirm it. (T:16, 19-20) The Corporation, moreover, is organized under Section 181 (non-profit) and 187 (Religious Society) of the Wisconsin Statutes. (T:5). In any event, these are not mutually exclusive facts as "registration" is not legally required. (T:6) In other words, an organization may be legally exempt without being registered as such. The lack of registration does not establish non-exempt status.

Primarily For A Religious Purpose:

The commission concedes Pastor Sortedahl's "primary personal motives . . . are no doubt Christian in nature." (Commission Brief p. 11) Nevertheless, the commission argues personal motives are irrelevant and, in any event, "[t]here can only be one 'primary purpose' for an organization, and here that goal was "one of reclaiming troubled children" rather than "fostering or promoting a religious purpose." (Commission Brief p. 9). Again, the commission's position is contrary to the case law. For example, a school may be operated "primarily for a religious purpose" even though the primary goal may have been educational. See cases cited in Plaintiff's Brief pp. 6-7.

Other State Law:

The commission complains this Court should not look to other state case law for assistance in interpreting identically or similarly worded Wisconsin statutes. The irony of this position is the commission's extensive reliance on *Nampa Christian Schools Foundation, Inc., v. State of Idaho Department of Employment*, 110 Idaho 918, 719 P. 2d 1178 (1986) in its own decision (Record pp. 7-12), the very case it now wants this Court to ignore. As many state statutes share language from the same federal law, these other state cases have persuasive value.

The commission tries but fails to distinguish the cases plaintiff cites in its brief. While there are factual differences between them, as there always will be, the essential points are unchallenged. Indeed, the commission simply rejects as unacceptable *Nampa's* holding on

the question of whether a school was "principally supported by an association of churches"; and fails to explain in any consistent conceptual sense how a nursery; a bakery; and a school with a primarily educational goal may still qualify as having a "primarily religious purpose" while the plaintiff, whose goals are also both religious and educational in nature, may not.

Finally, the commission closes by stating no "reasonable person could construe the employer's school to be a church or religion." (Commission's Brief p. 23). Yet its own employee initially determined plaintiff to be an exempt religious organization. Indeed, having heard the evidence presented at the hearing, her assessment would have been the same. (Record p. 20; T:33-34).

The decision of the Commission should be reversed.

Dated this 30th day of November, 1998.

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BEFORE THE
DEPARTMENT OF WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE DIVISION

Hearing No.
95002070MD

TRANSCRIPT

* * *

[32] A Those are my initials.

Q Those are yours, okay. Now, can you tell me what went into this document? What you did in your investigation to make the – which resulted in the x marks here, I guess, excluded employment and religious exclusion.

A We received a request from the Bureau of Benefits in February of 1995, to do an investigation on Peniel Christian School, Kenneth Sortedahl, owner. We wrote a letter to this organization. I subsequently had a telephone conversation with Kenneth Sortedahl in which he advised me that this school was operated by the Soldiers of Jesus Christ which was a church. So I notified the Bureau of Benefits that the religious exclusion applied.

Q Now, you've heard the testimony here today, correct?

A Correct.

Q And now, what does – does the department consider to be a church or religious organization?

A Our statutes don't define church. The exclusion that I refer to is the exclusion that says, that employment does not include service, one in the employ of a church or

convention or association of churches. Two, in the employ of an organization [33] operated primarily for religious purposes and operated, supervised, controlled or principally supported by a church or convention or association of churches or by a duly ordained, commissioned or licensed missioner of a church in the exercise of his or her ministry.

Q So, which section – which of those subsections did you apply here or do –

A Since we advised that this was a church. The subsection that would have applied was the first one, number one, (h)1, 108.02(15) (h)1.

Q Which was, could you repeat what that is again then the –

A "Employment does not include service in the employ of the church, or convention or association of churches.

Q Now, why did you decide that this was a church or –

A Because we were advised that it was a church. In these investigations concerning churches we accept their word.

* * *